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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1996

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1,
AUTHORITY,
Petitioner,
v.
SCIOTO WATER, INC., AND DANIEL R. GLICKMAN,
SECRETARY,
UNITED STATES DEPARTMENT OF AGRICULTURE
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1001 of the Omnibus Budget Reconciliation Act of 1986 ("OBRA") mandated that the Secretary of Agriculture (the "Secretary"), in fiscal years 1987-89, sell certain amounts of rural development loans evidenced by notes and other obligations held by the Farmers Home Administration ("FmHA") pursuant to the Consolidated Farm and Rural Development Act of 1961 (the "Rural Development Act") to assist the government in meeting the Gramm-Rudman-Hollings Act budget requirements. Section 803 of the Agricultural Credit Act of 1987 ("ACA") added subsections (f) and (g) to Section 1001 of OBRA. Subsection (f) requires that borrowers whose bonds the Secretary selects for sale be given a right of first refusal to buy them. Subsection (g) specifies that the curtailment and limitation of service prohibitions of § 306(b) of the Rural Development Act, 7 U.S.C. § 1926(b), protecting the service area of the borrower, shall be applicable to "all notes or other obligations sold or intended to be sold under this section". The question presented is:

Whether under Section 1001(g) of OBRA the curtailment and limitation of service prohibitions of 7 U.S.C. § 1926(b) continue to apply to protect Petitioner's service area after Petitioner purchased its own bonds from the Secretary by exercising the right of first refusal accorded it pursuant to Section 1001(f) of OBRA.

LIST OF PARTIES

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY (Petitioner), a regional water district created in 1966 as a political subdivision of the State of Ohio pursuant to Ohio Rev. Code Ann. § 6119, was the Plaintiff in the United States District Court for the Southern District of Ohio, Western Division, and Appellant before the United States Circuit Court of Appeals for the Sixth Circuit. There are no parent companies or non-wholly owned subsidiaries of Petitioner.

The following were Defendants in the United States District Court for the Southern District of Ohio, Western Division, and Appellees before the United States Circuit Court of Appeals for the Sixth Circuit: SCIOTO WATER, INC., a private, non-profit water supply corporation; and DANIEL R. GLICKMAN, Secretary of the United States Department of Agriculture, who has control of, and responsibility for, the Rural Economic and Community Development Service ("RECD") (formerly the Farmers Home Administration ("FmHA"), now known as Rural Development).

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	5
I. Statement of Facts	5
II. Proceedings Below	8
A. U.S. District Court for the Southern District Court of Ohio, Western Division	8
B. The Sixth Circuit Court of Appeals	12
REASONS FOR GRANTING THE PETITION	13
I. The Decision of the Sixth Circuit Court of Appeals Creates a True, Direct and Irreconcilable Conflict with the Decision of the Colorado Supreme Court in *City of Grand Junction v. Ute Water Conservancy District*, 900 P.2d 81 (Colo. 1995) Regarding an Important Question of Federal Law, the Application of Section 1001(g) of OBRA	13
II. The Sixth Circuit Court of Appeals Decided, as a Matter of First Impression in the Federal Courts, an Important Question of Federal Law, the Application of Section 1001(g) of OBRA, That Has Not Been, but Should Be Settled by this Court	17

Page

III. The Decision of the Sixth Circuit Court of Appeals Regarding an Important Question of Federal Law, the Application of Section 1001(g) of OBRA, Creates a True, Direct and Irreconcilable Conflict with the Relevant Decisions of this Court Concerning the Proper Judicial Construction of Federal Statutes 22

CONCLUSION 30

APPENDIX

TABLE OF AUTHORITIES

Cases

Page

Bell Arthur Water Corp. v. Greenville Utilities Commission, City of Greenville, N.C. and Ironwood Development Inc., No. 4:95-CV-122-H(2) (E.D.E.D.NC) 18

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 and n.9, 104 S.Ct. 2778 (1984) 22, 28, 29

City of Grand Junction v. Ute Water Conservancy District, 900 P.2d 81 (Colo. 1995) 7, 13, 14, 15, 18, 26

City of Madison, Mississippi v. Bear Creek Water Association, Inc., 816 F.2d. 1057 (5th Cir. 1987) 18, 19

Colautti v. Franklin 439 U.S. 379, 99 S.Ct. 675 (1979) 25

Community for Creative Non-Violence v. Reid, 490 U.S. 730, 104 L.Ed.2d 811, 109 S.Ct. 2166 (1989) 24

DeSylva v. Ballentine, 351 U.S. 570, 76 S.Ct. 974 (1956) 24

Estate of Cowart v. Nicklos Drilling, 505 U.S. 469, 112 S.Ct. 2589 (1992) 22

Field v. Mans 516 U.S. ___, 116 S.Ct. 437 (1995) .. 24

Good Samaritan Hospital v. Shalala, 508 U.S. ___, 113 S.Ct. 2151 28

Jennings Water, Inc. v. City of North Vernon, 895 F.2d 311 (7th Cir. 1989) 19

Jones v. Sherrill, 827 F.2d 1102 (6th Cir. 1987) ... 16

McCormick v. United States, 500 U.S. 257, 11 S.Ct. 1807 (1991) 27

Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318, 117 L.Ed.2d 581, 112 S.Ct. 1344 (1992) 24

TABLE OF AUTHORITIES

CASES

	Page
NLRB v. Amax Coal Co., 453 U.S. 322, 69 L.Ed.2d 672, 101 S.Ct. 2789 (1981)	24
Pinehurst Enterprises Inc. v. Town of Southern Pines, 690 F.Supp. 444 (M.D.N.C. 1988)	19
Rural Water System #1 v. City of Sioux Center, Iowa, Civ. No. C95-4112-MWB (N.D.W.D. IA)	18
Scioto County Regional Water District No. 1, Authority v. Scioto Water, Inc., et al., 103 F.3d 38 (6th Cir. 1996)	1, 2, 10
U.S. v. Kimball Foods, Inc., 440 U.S. 715, 99 S.Ct. 1448 (1979)	21
United States v. Morton, 407 U.S. 822, 104 S.Ct. 2769 (1984)	24
United States v. Winstar Corp., __ U.S. __, 116 S.Ct. 2432 (1996)	20
Wayne v. Village of Sebring, 36 F.3d 517 (6th Cir. 1994)	22

Statutes

5 U.S.C.	
Section 551	8
Section 701	8
Section 706	9
7 U.S.C.	
Section 1926(b)	*passim*
Section 1929a, note	2, 14
7 Code of Federal Regulation	
Section 1942.17(e)(1)	6
Section 1942.17(n)(2)(vii)	6

TABLE OF AUTHORITIES

STATUTES

	Pages
28 U.S.C.	
Section 1254(1)	2
Section 1331	8
Section 1361	8
Section 1367	9
Section 1651	8
Section 2201	8
Section 2202	8
31 U.S.C.	
Section 6501	8, 9
99 Stat. 1038	6
101 Stat. 1714	2, 13
Administrative Procedure Act	8, 9
Agricultural Credit Act (ACA)	
Section 803	1, 2, 7, 8, 13, 16, 22, 23
All Writs Act	8
Balanced Budget and Emergency Deficit Control Act of 1985	6
Consolidated Farm and Rural Development Act	
Section 306(b)	4, 5, 6
Federal Declaratory Judgment Act	8
Intergovernmental Cooperation Act	8, 9
Mandamus and Venue Act	8
Ohio Rev. Code Ann.	
Section 6119	ii
Omnibus Budget Reconciliation Act (OBRA)	
Section 1001	*passim*
Section 1001(f)	i, 2, 7, 13, 22, 23, 28
Section 1001(g)	*passim*

TABLE OF AUTHORITIES

STATUTES

Pages

Public Law
No. 99-509 2
No. 99-177 6
No. 100-233 2

Rules

Federal Rules of Civil Procedure
Rule 12(b)(6) 5, 9, 16, 27

Textbook

Wright & Miller, Federal Practice and Procedure: Civil 2d
Section 1366 27

Miscellaneous

H.R. Res. No. 100-295(I), 100th Cong. 1st. Sess. 53 reprinted in 1987 U.S.C.C.A.N. 2723 7

S. Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S.C.C.A. 2243 ..... 5, 19

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Scioto County Regional Water District respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

Review is sought of the Judgment of the United States Court of Appeals for the Sixth Circuit, dated December 18, 1996, reported as *Scioto County Regional Water District No. 1, Authority v. Scioto Water, Inc., et al.*, 103 F.3d 38 (6th Cir. 1996). The opinion of the Sixth Circuit Court of Appeals appears at pages 2a through 10a of the Appendix. The opinion of the United States District Court for the

Southern District of Ohio, Western Division, dated August 2, 1995, *Scioto County Regional Water District No. 1, Authority v. Scioto Water, Inc., et al.*, No. 6-1-95-204, is unreported, and appears at pages 11a through 26a of the Appendix.

JURISDICTION

The Sixth Circuit Court of Appeals entered its judgment on December 18, 1996. A copy of the judgment appears at page 1a of the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The principal statute involved is Section 1001 of the Omnibus Budget Reconciliation Act of 1986 ("OBRA"), Pub. L. No. 99-509, 7 U.S.C. § 1929a, note. Section 803 of the Agricultural Credit Act of 1987 ("ACA"), Pub. L. No. 100-233, Title VIII, § 803, 101 Stat. 1714 (1988), amended Section 1001 of OBRA to add subsections (f) and (g):

"SEC. 803. SALE OF RURAL DEVELOPMENT NOTES.

> Section 1001 of the Omnibus Budget Reconciliation Act of 1986 (7 U.S.C. 1929a note) is amended by adding at the end thereof the following new subsections:
>
> *(f) Right of First Refusal. —*
>
> (1) In General. — Before conducting a sale of a portfolio of notes or other obligations under this section, the Secretary of Agriculture shall —

(A) determine whether the issuer of any unsold note or other obligation desires to purchase the note or other obligation; and

(B) if so, hold open for 30 days, an offer to sell the note or other obligation to the issuer at a price to be determined under paragraph (2).

(2) Determination of Offering Price. —

(A) Authority. — The Secretary of Agriculture shall determine, in accordance with subparagraph (B), the price at which a note or other obligation shall be offered for sale under this subsection.

(B) Price. — Such price shall be determined by discounting the payment stream of such note or other obligation at the yield on the then most recent sale of the portfolio, adjusted for changes in market interest rates, servicing and sales expenses, and the maturity and interest rate of such note.

(3) Prohibitions.—

(A) Purchase of the Obligation Not Tied to Purchase of Other Obligations. — The Secretary of Agriculture shall not require the issuer of any unsold note or other obligation to be offered for sale under this subsection to purchase any other such note or other obligation as a condition of the sale of any such note or other obligation to the issuer.

(B) Offer to be Made Without Regard to Financing. — The Secretary shall offer notes or other obligations for sale to the issuers thereof under this subsection without regard to the manner in which such issuers intend to finance the

purchase of such notes or other obligations. However, the price of sale to any issuer using tax exempt financing shall be determined using a yield reflective of the Schedule of Certified Interest Rates as published monthly by the Secretary of the Treasury.

(g) Applicability of Prohibition on Curtailment or Limitation of Service. — Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b)) shall be applicable to all notes or other obligations sold or intended to be sold under this section."

Section 1001 of OBRA, as amended, appears in the Appendix at pages 90a through 93a.

The provision referenced in § 1001, subsection (g) of OBRA, Section 306(b) of the Consolidated Farm and Rural Development Act of 1961 (the "Rural Development Act"), 7 U.S.C. § 1926(b) provides:

"(b) Curtailment or limitation of service prohibited

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of the loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of occurrence of such event."

STATEMENT OF THE CASE

I. Statement of Facts.

In Section 306 of the Consolidated Farm and Rural Development Act of 1961, 7 U.S.C. § 1926, Congress established a community development loan program administered by the FmHA authorizing loans to associations providing water service to farmers, ranchers, farm tenants, and other rural residents. S. Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S.C.C.A. 2243, 2309.

Petitioner Scioto County Regional Water District No. 1, Authority ("Water 1") was organized as a public district at the request of five townships in Scioto County, Ohio, to be a wholesale and retail water purveyor, and became effective upon order of the Court of Common Pleas of Scioto County, Ohio on or about November 28, 1966. (¶V.1.)[1] Subsequently, over the next two to three years, three additional townships were added to Water 1's service area. Since that time, Water 1 has continuously provided water service to these eight townships of rural northeastern Scioto County. (*Id.*)

From May 17, 1967 through November 29, 1973, Water 1 issued, pursuant to appropriate authorizing ordinances, and sold three series of revenue bonds in the total amount of $2,996,000 to the FmHA under the Rural Development

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[1] As this matter comes before this Court from the District Court's granting of a motion to dismiss pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), the specific facts set forth in this and other paragraphs of the text in this section of the Petition concerning Water 1 are taken from Water 1's First Amended Complaint (Verified) for Temporary Restraining Order; Alternatively, Preliminary Injunction, Permanent Injunction, and Mandamus Order ("First Amended Complaint"). References in the text are to the paragraphs of the First Amended Complaint. The First Amended Complaint appears at pages 94a through 115a of the Appendix.

Act. (¶V.2.) The funds developed from the sale of these bonds were utilized to construct and operate an affordable cost water utility to serve the eight rural townships, and the bonds were secured by all system revenues derived from Water 1's operations in those eight townships. (*Id.*) On May 1, 1975, Water 1 issued water revenue refunding bonds in the amount of $2,473,000 to the FmHA, having redeemed, by consent of the FmHA, the initial and outstanding resource revenue bonds. (¶V.4.) Throughout this period, the curtailment prohibitions of 7 U.S.C. § 1926(b) protected the service area, revenues, and rate payers (present and future) from any act of impairment. ((¶¶V.2, 4.) In addition, pursuant to the Rural Development Act and regulations promulgated by the Secretary of Agriculture pursuant thereto, Water 1 was obligated to make service available throughout the service area. (¶V.3.) 7 C.F.R. §§ 1942.17(e)(1), (n)(2)(vii).

In 1972, Respondent Scioto Water, Inc. ("SWI") sought permission to become Water 1's permittee to extend Water 1's transmission lines to areas in which Water 1 was obligated to provide service or make service available. (¶V.3.) Water 1 and SWI therefore entered into an agreement by which Water 1 provided water to SWI on a wholesale basis and SWI provided water on a retail basis to a portion of Water 1's service area. (¶V.5.) Various contracts were entered into over the years by the two entities under which Water 1 was a water producer, wholesale supplier and retailer, and SWI was a bulk water purchaser and retailer. (¶¶V.5,6,7.) Water 1 incurred additional debt in order to finance expansion and improvements of its well field and treatment facility in reliance upon the revenue stream expected over the 60-year term of the water purchase agreement with SWI. (¶V.8.)

In 1986 Congress passed OBRA, which in Section 1001 ordered the Secretary to sell FmHA notes and bonds in its

Rural Development Insurance Fund in order to lower the federal deficit on a schedule mandated by the Gramm-Rudman-Hollings Act.[2] Section 1001(a) required the Secretary to sell a sufficient quantity of such notes and bonds during fiscal years 1987-89 to achieve prescribed minimum net proceeds to the government for each fiscal year.

In 1987, Congress passed ACA, "the most comprehensive and far-reaching legislation addressing the delivery of agricultural credit in many years," H.R. Res. No. 100-295(I), 100th Cong., 1st Sess. 53, reprinted in 1987 U.S.C.C.A.N. 2723, 2725. "One of the primary purposes of enacting this comprehensive legislation was to create an improved secondary market for FmHA loans. See id. at 54, reprinted in 1987 U.S.C.C.A.N. at 2725.26." *City of Grand Junction v. Ute Water Conservancy District*, 900 P.2d 81, 92 (Colo. 1995) (App., *infra*, 27a-66a).[3] ACA Section 803, added to Section 1001 of OBRA subsections (f), according a right of first refusal to borrower water districts, and (g), extending the service area protections to "all notes or other obligations sold or intended to be sold under this section."

The Secretary of Agriculture has never issued regulations respecting the implementation of OBRA.

In 1989, Water 1's bonds were selected by the Secretary of Agriculture for sale pursuant to Section 1001 of OBRA, and the Secretary accorded Water 1 a right of first refusal pursuant to Section 1001(f) of OBRA to purchase its own bonds. (¶V9.) Water 1 exercised that right of first refusal and purchased its own bonds. (*Id.*) Water 1 effected the purchase of its bonds through private financing and remains indebted on that financing.

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[2]The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1038 (1985).

[3]"App., *infra*, 27a-66a" refers to pages 27a-66a of the attached Appendix.

Commencing in 1990-91, SWI sought and subsequently obtained approval of a loan and grant from the FmHA, the initial disbursement of which was received by SWI in 1994, for development of a new well field two miles upstream from Water 1's well field and a supporting water treatment plant to provide a water source independent of Water 1. (¶V.10.)

II. Proceedings Below.

A. U.S. District Court for the Southern District Court of Ohio, Western Division.

On March 17, 1995, Water 1 filed a complaint in the U. S. District Court for the Southern District of Ohio, Western Division, against SWI and the Secretary of Agriculture alleging SWI's encroachment upon Water 1's service area in violation of the curtailment and limitation of service prohibitions of 7 U.S.C. § 1926(b), as applied by Section 1001 of OBRA and Section 803 of ACA, and the Secretary of Agriculture's failure to enforce those provisions. On March 24, 1995, Water 1 filed its First Amended Complaint (Verified) for Temporary Restraining Order; Alternatively Preliminary Injunction, Permanent Injunction, and Mandamus Order ("First Amended Complaint"). Water 1's First Amended Complaint appears at pages 94a through 115a of the Appendix. Subsequently, the District Court granted Water 1 leave to amend to add an additional basis for jurisdiction, and additional claims. Water 1's Motion for Leave to Supplement Amended Complaint appears at pages 116a through 126a of the Appendix.

Water 1 invoked the jurisdiction of the District Court under 28 U.S.C. § 1331 (federal question jurisdiction); the Intergovernmental Cooperation Act, 31 U.S.C. § 6501 *et seq.*; the Administrative Procedure Act, 5 U.S.C. §§ 551, 701 *et seq.*; the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201-02; the Mandamus and Venue Act, 28 U.S.C. § 1361; the All Writs Act, 28 U.S.C. § 1651, *et seq.*;

and, over certain Ohio state law claims, 28 U.S.C. § 1367 (supplemental jurisdiction).

Water 1 alleged in its First Amended Complaint that SWI's well field and surface water treatment plant, and the Secretary of Agriculture's approval of that project, would impair Water 1's system and result in lost revenues based on: (a) loss of bulk water sales; (b) loss of underground aquifer water flows; (c) loss of volume of water due to well field proximity; (d) required redesign and reconstruction of Water 1's water treatment plant; (e) and loss of retail customers to SWI. Water 1 further alleged that this development would transform SWI into a water producer and eliminate the bulk water sales upon which Water 1's financing was predicated in part, thereby impairing its ability to repay its indebtedness. (¶¶V.8,12;¶VI.3.)

Therefore, Water 1 sought a permanent injunction against SWI and the Secretary of Agriculture from violating the curtailment and limitation of service prohibitions of 7 U.S.C. § 1926(b); injunctive relief against SWI and the Secretary of Agriculture to comply with the Intergovernmental Cooperation Act, 31 U.S.C. § 6501 *et seq.*; injunctive relief under the Administrative Procedure Act, 5 U.S.C. § 706; a writ of mandamus directed to the RECDS; declaratory relief; attorney's fees; and monetary relief under certain Ohio state claims.

In response, SWI filed a motion to dismiss Water 1's First Amended Complaint under Federal Rules of Civil Procedure, Rule 12(b)(6), and a Cross-Complaint. Water 1 then filed a motion for partial summary judgment on its claim under the curtailment and limitation of services prohibitions of 7 U.S.C. § 1926(b). The Secretary of Agriculture filed a counter-motion for summary judgment.

The District Court, the Honorable Sandra S. Beckwith presiding, in an unpublished opinion, granted SWI's motion

to dismiss Water 1's federal claims; then declined to exercise supplemental jurisdiction over Water 1's Ohio state claims; and denied Water 1's application for injunctive relief, application for temporary restraining order, and motion for partial summary judgment as moot. D.C.Op. at p. 18 (App., *infra*, 26a).[4] The District Court's ruling was based on its conclusion that Water 1 had failed to state a claim under 7 U.S.C. § 1926(b). *Id.*

The District Court found the language of Section 1001(g) of OBRA, applying the provisions of 7 U.S.C. § 1926(b) to "all notes and bonds sold or intended to be sold", ambiguous, and therefore looked beyond the language of subsection (g) in order to determine the meaning of that language. D.C.Op. at p. 14 (App., *infra*, 22a). The Court was not persuaded that there was any administrative interpretation of the agency that deserved deference (D.C.Op. at p. 14, n. 8 (App., *infra*, 22a-23a)), and found the legislative history did not provide any insight with regard to the specific issue before it. D.C.Op. at p. 12, n. 6 (App., *infra*, 21a). Instead, the District Court interpreted Section 1001(g) of OBRA to recognize two types of obligations, those sold to third parties and those purchased by the issuer, based upon its construction of the phrase "under this section". D.C.Op. at pp. 14-15 (App., *infra*, 23a). The Court concluded that "all notes sold or intended to be sold under this section" applies only to notes sold to third parties, and that a purchase by the issuer was not a sale "under this section". D.C.Op. at p. 15 (App., *infra*, 23a). Therefore, in the conclusion of the District Court, the curtailment and limitation of service prohibitions of 7 U.S.C. § 1926(b) are not extended by Section 1001(g) of OBRA to purchases by the

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[4]References to the unpublished opinion of the District Court, *Scioto County Regional Water District No. 1, Authority v. Scioto Water, et al.*, No. C-1-95-204 (S.D.W.D. Ohio Aug. 2, 1995), are to "D.C.Op.".

issuer of its own notes or other obligations. D.C.Op. at pp. 15, 16 (App., *infra*, 23a-24a).

The District Court reasoned that its interpretation of OBRA was consistent with the statutory scheme, because continued service area protection would provide an inducement to third party purchasers that would further the purpose of OBRA to generate specified net proceeds by selling notes and other obligations held by it. D.C.Op. at pp. 15 (App., *infra*, 23a-24a). On the other hand, the court continued, offering the same incentive to debtors who might wish to repurchase their obligations would not necessarily further assist the Secretary in fulfilling the statutory mandates, because the statute offered a different incentive to debtors: purchasing at a discount. D.C.Op. at pp. 15-16 (App., *infra*, 23a-24a). Therefore in the view of the District Court, there is a rational basis for extending the service area protection to third party purchases, but not to issuer purchases. D.C.Op. at pp. 15-16 (App., *infra*, 24a). As an additional rational basis for this distinction, the District Court found it reasonable that Congress extended to third parties the continued service area protection because such third-party purchasers have no control over the transaction and could not be said to have voluntarily relinquished the benefits conferred by 7 U.S.C. § 1926(b). D.C.Op. at p. 16 (App., *infra*, 24a). The issuer purchaser, however, in the view of the District Court, could be said to have voluntarily relinquished any rights bestowed by that section. D.C.Op. at p. 16 (App., *infra*, 24a).

Although the District Court dismissed the entirety of Water 1's claims, the decision of the District Court is interlocutory because the Counter-Claim of SWI remains to be adjudicated.

B. The Sixth Circuit Court of Appeals.

The Sixth Circuit articulated the issue before it as follows: "whether subsection (g)'s provision that § 1926(b) applies to 'all' obligations 'sold or intended to be sold' means that § 1926(b)'s protection extends to a bond issuer, such as Water 1, that buys back its own bonds from the Farmers Home Administration, effectively extinguishing them." 103 F.3d. at p. 40 (App., *infra*, 7a). Recognizing that the issue before it was one of first impression in the federal courts (103 F.3d at pp. 40-41 (App., *infra*, 7a)), the Sixth Circuit Court of Appeals affirmed. It described the District Court opinion as well-reasoned and endorsed the District Court's conclusion that Section 1001(g) of OBRA applies only to obligations sold by the FmHA to third parties and not to Water 1's repurchase of its own bonds. 103 F.3d at p. 42 (App., *infra*, 10a).

The Sixth Circuit accepted SWI's argument that Water 1's bonds were marked "paid in full" by the Department of Agriculture when Water 1 paid for them, and therefore, the debt was discharged in the transaction, not sold. 103 F.3d at p.42 (App., *infra*, 10a). The Court suggested that the intent of the parties in this transaction was to discharge the bonds rather than preserve the obligation. Accordingly, in the Circuit Court's view, Water 1 is not eligible for protection of its service area because 7 U.S.C. § 1926(b) requires that Water 1 be indebted to the FmHA. *Id.* The Circuit Court found this interpretation faithful to the main legislative purposes in enacting 7 U.S.C. § 1926(b) — safeguarding FmHA loans: "Although the government maintains an interest in providing affordable rural water service, its interest in protecting against competition diminishes as its loans are repaid." *Id.* The Court further agreed with SWI's argument that the language of Section 1001(g) did not alter the requirement that Water 1 be indebted to the FmHA.

REASONS FOR GRANTING THE PETITION

I. The Decision of the Sixth Circuit Court of Appeals Creates a True, Direct and Irreconcilable Conflict with the Decision of the Colorado Supreme Court in *City of Grand Junction v. Ute Water Conservancy District*, 900 P.2d 81 (Colo. 1995) Regarding an Important Question of Federal Law, the Application of Section 1001(g) of OBRA.

As articulated by both the District Court and the Court of Appeals below, the Colorado Supreme Court in *Ute Water Conservancy District v. City of Grand Junction*, 900 P.2d 81 (Colo. 1995) (*"Ute"*)[5] considered the question presented in this Petition and concluded that Section 1001(g) of OBRA extends the curtailment and limitation of service prohibitions of 7 U.S.C. § 1926(b) to a debtor who purchases its own notes at a discount under the right of first refusal provisions of Section 1001(f) of OBRA: OBRA Section 1001 "directs the FmHA to sell notes and bonds in its possession in order to lower the Federal deficit without removing the protection provided for rural districts and their lenders under § 1926(b)." 900 P.2d at 85, n. 5 (App., *infra,* 37a). The Colorado Supreme Court looked at the plain language of the statute and found the use of the word "all" in the phrase "all notes and other obligations sold or intended to be sold under this section" in Section 1001(g) of OBRA unambiguously included all notes sold under the asset sale program, whether to third parties or to the issuer. *Ute*, 900 P.2d at pp. 90-91 (App., *infra,* 52a-53a).

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[5] A copy of the opinion appears at pages 27a through 66a of the Appendix. The Appendix also contains, at pages 67a through 78a, a copy of the Colorado Court of Appeals decision the Colorado Supreme Court affirmed.

Furthermore, the Colorado Court found that the fact "Congress provided for a comprehensive scheme for selling bonds held by the FmHA back to the issuers also supports our conclusion that Congress intended to allow an issuer to reacquire its bond or note without losing protection under Section 1926(b). See ACA, § 803(f) and (g), of Stat. 1714 (codified at U.S.C. § 1929(a) note (1994))." *Id.* at p. 91 (App., *infra,* 54a).

The District Court specifically disagreed with this conclusion[6] and proceeded to read the statute to reach the opposite conclusion, that the term "notes and bonds sold or intended to be sold" referred to only those sold to third parties. D.C.Op. at p. 15 (App., *infra* 22a-23a). The District Court, therefore, concluded that Section 1001(g) of OBRA applies the service area protection provisions only to all notes sold to third parties.[7] *Id.* The Sixth Circuit in the conclusion of its opinion describes the District Court's opinion as "well-reasoned", articulates the conclusion of the District Court that Section 1001(g) of OBRA applies only to FmHA obligations sold to third parties and not to issuers who purchase their own obligations, and affirms the District Court's judgment. 103 F.3d at p. 42 (App., *infra,* 10a).

At an earlier point in its opinion, the Sixth Circuit sought to distinguish the decision of the Colorado Supreme Court in *Ute* with regard to the question presented in this Petition on the basis that the Court in *Ute* articulated that the protections of 7 U.S.C. § 1926(b), as extended by Sec-

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[6]The District Court stated, "This Court disagrees with the conclusion that the language of § 1929a note, subsection (g) clearly encompasses those obligations which a debtor has purchased from the FmHA." D.C.Op. at 14-15.

[7]Of course, this reading renders the phrase, "intended to be sold", in Section 1001(g) meaningless, mere surplusage. This problem with the District Court Opinion is discussed in a subsequent portion of this section.

tion 1001(g) of OBRA, apply to bonds the issuer has repurchased with the intent not to discharge the obligation.[8]103 F.3d 42 (App., *infra*, 9a-10a). Furthermore, the

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[8]In *Ute*, the district issued bonds in 1981. In 1983, it engaged in a transaction known as an advance refunding in which it issued new bonds and deposited the proceeds in an escrow account from which payment of the installments of principal and interest on the 1981 bonds were made as they came due. The escrow account replaced the district's revenues as security for the 1981 bonds and the revenues became security for the new bonds. In 1998, when Ute Water Conservancy District purchased its 1981 bonds under Section 1001 of OBRA, the Department of Agriculture endorsed them over to the District and directed the escrow agent to make payments under the bonds to the District. *Ute* at p. 93 (App., *infra*, 58a). The trial court found, based primarily on these facts, that the Secretary of Agriculture and the water district evidenced an intent to preserve the obligation in the transaction. The Colorado Supreme Court concluded that the federal statutes govern whether the purchase by an issuer water district of its own bonds under OBRA serves to extinguish the obligation. The *Ute* court further concluded that Section 1001(g) expresses the specific intent of Congress to preserve such obligations for the purpose of preserving the protections of 7 U.S.C. § 1926(b). Given the trial court's determination that in the case before it the parties had specifically structured the transaction so as to preserve the obligation, the Colorado Supreme Court understandably included that fact when it stated its holding:

> "Therefore, we hold that section 1926(b) applies to all notes and bonds sold by the FmHA — including those reacquired by the issuer with the intent not to discharge the instrument, as in the present case — and that the District did not discharge the 1981 revenue bond when it reacquired the instrument from the FmHA in 1988."

Ute at p. 92 (App., *infra*, 55a). The facts of this case present a different issue, due to the actions of the Secretary of Agriculture in marking the bonds "paid in full". Water 1's position on this Petition is that the result should be the same, because the key issue is the intent of Congress as expressed in the plain meaning of the statute and does not depend upon the intent of the parties, and certainly not the intent of the Department of Agriculture. The District Court seemed to understand this point, as its opinion is based upon its erroneous reading of OBRA, rather than upon any consideration of the specific intent of the parties. Furthermore, Petitioner finds no indication in section 1001(g) that Congress required

Sixth Circuit erroneously stated that the Colorado Supreme Court relied on state law for the proposition that repurchase of a bond does not necessarily extinguish it. 103 F.3d at p. 42 (App., *infra,* 10a). In fact, the Colorado court concluded that federal law was determinative, *Ute* at pp. 87-89 (App., *infra,* 42a-50a), and merely stated that Colorado law supported its conclusion, *Ute* at p. 92 (App., *infra,* 55a). The Sixth Circuit proceeded to distinguish the facts of this case by stating that the bonds had been marked as "paid in full" by the Department of Agriculture and returned to Water 1. 10 F.3d 42 (App., *infra,* 10a). Irrespective of the propriety of the Sixth Circuit's consideration of facts not before it on a motion to dismiss,[9] the Court of Appeals simply stated as a fact that a purchase by an FmHA debtor of its own obligations serves to extinguish them and therefore eliminates the debt required for application of 7 U.S.C. § 1926(b).[10] Therefore, the Sixth Circuit's view is, in essence, that as a matter of law a debtor who purchases its own FmHA obligations is not benefitted by Section 1001(g) of OBRA, a position consistent with the last paragraph of its

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a debtor water district to engage in a fiction like that created by the water district and the Secretary of Agriculture in the *Ute* case in order to continue receiving the service area protection for the length of the term of its bonds purchased under OBRA.

[9]This case involves the District Court's granting of a motion to dismiss under the Federal Rules of Civil Procedure, Rule 12(b)(6). The complaint does not include this allegation and it is therefore not properly before the Court. Furthermore, the Sixth Circuit's conclusion that the intent of the parties in this case was inconsistent with that of the parties in *Ute* is also not properly before the Court on a motion to dismiss, because it is unquestionably an issue of fact. *See Jones v. Sherrill,* 827 F.2d 1102, 1103 (6th Cir. 1987).

[10]Petitioner's position is that Section 1001(g) was added by Section 803 of ACA precisely to prevent such conclusion. By making the threshold assumption that a debtor's purchase of its own obligations under Section 1001 of OBRA serves to extinguish them, the Court of Appeals assumes away the critical statutory issue.

opinion and directly and irreconcilably in conflict with the opinion of the Colorado Supreme Court in *Ute.*

II. The Sixth Circuit Court of Appeals Decided, as a Matter of First Impression in the Federal Courts, an Important Question of Federal Law, the Application of Section 1001(g) of OBRA, That Has Not Been, but Should Be Settled by this Court.

As the Sixth Circuit recognized, this case appears to present a question "of first impression in the federal courts," with only one other reported decision, the Ute decision, directly on point. 103 F.3d at pp. 40-41 (App., *infra,* 7a).

The question of the applicability of the curtailment and limitation of service prohibitions of 7 U.S.C. § 1926(b) to obligations purchased by FmHA debtors under OBRA, is one that potentially affects hundreds of water associations in numerous states, primarily in the Midwestern and Southeastern United States. Under OBRA, Congress directed the sale of obligations in amounts sufficient to realize net proceeds to the United States of not less than $1 billion in the 1987, $552 million in the 1988 and $547 million in the 1989 fiscal years. Without a determination by this Court, the question presented in this Petition is subject to repeated litigation in numerous different federal and state courts, and without guidance from this Court, the question presented in this Petition is subject to continued and repeated conflicting determinations.[11] Petitioner is advised that there are at least

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[11] The appeal to the Sixth Circuit of this case was interlocutory in the sense that SWI has a cross-complaint pending for injunctive relief to enforce the service area protections associated with its 1994 borrowing from the RECD. The question presented on this Petition has been fully and finally determined by the District Court and the Sixth Circuit, and nothing in the remainder of the case will affect this determination or reduce its importance. In fact, this determination will severely prejudice Water 1 with respect to the adjudication of SWI's cross-complaint.

two lawsuits currently pending in the federal and state courts involving in some way the question presented on this Petition.[12] Furthermore, this question could arise in litigation at any time in the future that there is an effort to curtail the service or limit the service area of a water district that purchased its notes under OBRA.

Furthermore, the applicability of the service area protections of 7 U.S.C. § 1926(b) are critical both to the purchaser districts, and also to the private lenders who financed these purchases. As explained by Judge Edith Jones in *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, 816 F.2d 1057 (5th Cir. 1987) (a copy of which appears at pages 79a through 93a of the Appendix), the congressional purposes of the service area protections as articulated in the legislative history are: "1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and 2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *Id.* at p. 1060 (App., *infra*, 86a). Judge Jones gleaned these purposes from the following portion of the legislative history:

> "By interpretation, loans cannot now be made unless a major part of the use of the facility is to be by farmers. This section would broaden the utility of this authority somewhat by authorizing loans to associations serving farmers, ranchers, farm tenants, and other rural residents. This provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including

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[12] *E.g., Rural Water System #1 v. City of Sioux Center, Iowa*, Civ. No. C95-4112-MWB (N.D.W.D. IA). *Bell Arthur Water Corp. v. Greenville Utilities Commission, City of Greenville, N.C. and Ironwood Development, Inc.*, No. 4:95-CV-122-H(2) (E.D.E.D. NC).

> service to other rural residents, the cost per user is decreased and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water. A new provision has been added to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural system."

Id., citing S. Rep. No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U.S. Code Cong. & Admin. News 2243, 2309 (App., *infra*, 85a-86a). See also, *Jennings Water, Inc. v. City of North Vernon*, 895 F.2d 311, 315 (7th Cir. 1989); *Ute* at p. 88 (App., *infra*, 46a).

The federal courts consistently have recognized the enormous significance of the service area protection provisions to the congressional purpose of extending rural water service and have therefore recognized that Congress intended a broad reading for 7 U.S.C. § 1926(b). *Jennings Water, Inc. v. City of N. Vernon, Indiana*, 895 F.2d 311, 315 (7th Cir. 1989). For example, the courts have refused to allow attacks on the protection based on the argument that debtor districts would not suffer economically if the curtailment and limitation of service provisions were violated. *Pinehurst Enterprises Inc. v. Town of Southern Pines*, 690 F.Supp. 444, 452, (M.D.N.C. 1988), *aff'd*, 887 F.2d 1080 (4th Cir. 1989) Judge Jones in *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, 816 F.2d 1057 (5th Cir. 1987), applied a bright-line rule to hold that the provisions preclude a municipality from condemning facilities that are located within the city limits throughout the FmHA loan term, 816 F.2d at p. 1059 (App., *infra*, 85a), reasoning that:

> "Even if fair value is paid for the lost facilities, such an action would inevitably have an adverse effect on the remaining customers of Bear Creek, in the form of lost

> economies of scale and resulting higher per-user costs. To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of a water association with the highest population density (and thus the lowest per-user cost) would undermine Congress' purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FmHA debts."

Id. at p. 1060 (App., *infra*, 86a-87a).

Thus, the service area protections are extremely critical to the financial viability of rural water districts and to the goal of Congress in creating the FmHA loan program of extending inexpensive water supplies to rural areas of America. Consequently, a debtor district would not lightly relinquish those protections. Contrary to the District Court's own unauthorized policy making adventure, uninformed by even the fact finding of a trial, a rural water district would not consider purchasing its notes or other obligations at a discount under Section 1001 of OBRA an adequate inducement to participate in the asset sale program if it knew that the service area protections would be lost in the transaction. This situation is reminiscent of that described in this Court's recent decision in *United States v. Winstar Corp.*, ___ U.S. ___, 116 S.Ct. 2432, 2472 (1996):

> "It would indeed, have been *madness* for respondents to have engaged in these transactions with no more protection than the government's reading would have given them, for the very existence of their institutions would then have been in jeopardy from the moment their agreements were signed."

Furthermore, because the FmHA community development loan program involved making loans to districts which would be unlikely to find sufficiently inexpensive financing

elsewhere,[13] debtor districts would need the benefits of continued protection for the term of the notes in order to obtain financing for the purchase of their notes.

The important question presented on this Petition, therefore, must be considered by this Court to prevent the rural water districts that came to the assistance of the Federal Government in a time of need for funds from suffering the unintended consequence of loss of service area protections that is threatened by the Sixth Circuit Court of Appeals decision in this case. This consequence was unintended by Congress, given the plain meaning of Section 1001(g) of OBRA ("all notes sold or intended to sold under this section"). This consequence was also unintended by the purchaser districts like Water 1, because, in addition to the statutory language of Section 1001(g) of OBRA, they received a right of first refusal under Subsection (f), which in common understanding means that they were being offered an opportunity to purchase their notes on the same terms and conditions as those being offered to third party purchasers.

Loss of service area protections places participating rural water districts at serious risk of having their customer base and perhaps their facilities taken by expanding municipalities through annexation or condemnation, thereby seriously damaging the financial ability of these districts to continue serving rural customers, especially those in the most remote and low density locations. This result would totally frustrate Congress' purpose in creating the rural community development loan program because of the misreading of OBRA, which was not designed to alter the loan program, but rather, to specifically preserve the integrity and effectiveness

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[13] *U. S. v. Kimball Foods, Inc.*, 440 U.S. 715, 735, 99 S.Ct. 1448, 1462 (1979).

of the loan program,[14] in the midst of efforts to develop funds to assist the Federal Government to move in the direction of a balanced budget.

III. The Decision of the Sixth Circuit Court of Appeals Regarding an Important Question of Federal Law, the Application of Section 1001(g) of OBRA, Creates a True, Direct and Irreconcilable Conflict with the Relevant Decisions of this Court Concerning the Proper Judicial Construction of Federal Statutes.

This Court has frequently emphasized that the first step in the analysis of a federal statute is the determination of "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unanimously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, n. 9, 104 S. Ct. 2778, 2781 (1984); *see also, Estate of Cowart v. Nicklos Drilling*, 505 U.S. 469, 478, 112 S.Ct. 2589, 2595 (1992).

Looking at Section 1001(g) of OBRA, Congress stated that the service area protections would continue to apply after sale, to "all notes or other obligations sold or intended to be sold under this section." There is no ambiguity in the word "all": it means every. There is no ambiguity in the phrase "notes or other obligations": it means evidences of the FmHA loans that Congress mandated be sold to raise funds for the government. There is no ambiguity in the phrase "sold": Section 1001 consistently uses the terms "sale", "sold", "purchase" and the like to refer to both the transactions with third parties and with debtor water dis-

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[14]See *Wayne v. Village of Sebring*, 36 F.3d 517 (6th Cir.1994), cert. den., ___ U.S. ___, 115 S.Ct. 2000 (1995).

tricts.[15] There is no ambiguity in the phrase "intended to be sold": Congress directed the Secretary of Agriculture to choose which loans to sell to achieve the prescribed net proceeds for the government each year of the program; those selected by the Secretary of Agriculture are those "intended to be sold" and concerning which the Secretary was required under subsection (f) to accord a right of first refusal to the debtor district involved. Finally, there is no ambiguity in the reference to "this section": it is the section in which subsection (g) is included — Section 1001 of OBRA; both sales to third parties and sales to debtor districts were effected pursuant to Section 1001.

There is, therefore, no ambiguity whatsoever in Section 1001(g) of OBRA: it extends the service area protections of 7 U.S.C. § 1926(b) to each and every note selected by the Secretary of Agriculture for sale, whether the sale was ultimately made to a third party or to the debtor water district, for the term stated in the note. This patent meaning of Section 1001(g), that it applies to both sales to third parties and sales to debtor water districts, is bolstered by the context of its passage. Subsection (g) was added by Section 803 of ACA, which added only one other subsection to Section 1001: subsection (f), requiring the Secretary of Agriculture to offer a right of first refusal *to the debtor water districts* with respect to the notes it selects for sale. Furthermore, the conclusion that service area protection applies to notes sold to both third parties and debtor districts, is consistent with the language in subsection (f), according a right of first refusal to the debtor water district. Given its

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[15] Section 803 of ACA, which added subsection (f) of Section 1001 to OBRA, the provision according a right of first refusal to debtor districts, is entitled: "Sale of Rural Development Notes." Section 1001(f) of OBRA refers to the transaction as involving a purchase ((1)(A), (3)(A)), an offer to sell ((1)(B)), sale ((3)(A), (3)(B)), and an obligation to be offered for sale ((2)(A), (3)(A)).

settled meaning in the law[16], there is no ambiguity in Congress' use of the phrase "right of first refusal": it is commonly understood to mean the extension of an offer to purchase on *the same terms and conditions* proposed to be given to a third party. Thus, the plain meaning of this phrase in subsection (f) is consistent with the plain meaning of the specific provision of subsection (g), the same terms and conditions concerning service area protection are provided to both third parties and debtor districts.

The District Court below seriously departed from this Court's settled principles of statutory construction by parsing the phrase "all notes or other obligations" to create an artificial barrier to giving effect to the inclusive word "all". The District Court focused separately upon the phrase "notes or other obligations" and questioned what universe of notes or other obligations was intended. The District Court then found this phrase ambiguous, concluded there was no settled administrative interpretation to which to defer and found no help in the legislative history. The District Court, therefore, proceeded to make its own policy. To do so, the District Court refused to read Section 1001 as a single statute, again seriously departing from this Court's precedents and settled principles of statutory construction. *United States v. Morton*, 407 U.S. 822, 828, 104 S.Ct. 2769, 2772 (1984); *DeSylva v. Ballentine*, 351 U.S. 570, 572, 76 S.Ct. 974, 976 (1956). The Court then focused upon the applica-

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[16] *See Field v. Mans*, 516 U.S. ____, 116 S.Ct. 437, 445-46 (1995): "It is . . . well established that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.' *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739, 104 L.Ed.2d 811, 109 S.Ct. 2166 (1989) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329, 69 L.Ed.2d 672, 101 S.Ct. 2789 (1981)); see also *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322, 117 L.Ed.2d 581, 112 S.Ct. 1344 (1992)."

tion of 7 U.S.C. § 1926(b), rather than upon Section 1001(g), which it purported to be construing and which specifies the application of 7 U.S.C. § 1926(b) with respect to the asset sale program of OBRA. Based upon this backward approach, the Court construed Section 1001(g) as having no effect upon the application of 7 U.S.C. § 1926(b), except where the District Court made the policy choice that such incentive was required to effectuate the asset sale program: in the case of third party purchasers.

The effect of the District Court's opinion is also at odds with this Court's precedents and settled principles of statutory interpretation in that it renders the phrase "intended to be sold" mere surplusage. *Colautti v. Franklin*, 439 U.S. 379, 392, 99 S.Ct. 675, 684 (1979). Section 1001(g) provides that the prohibitions on curtailment or limitation of service "shall be applicable to all notes or other obligations *sold or intended to be sold under this section.*" Under the District Court's construction of Section 1001(g), the phrase "under this section" only refers to third party sales. The District Court does not specifically discuss the phrase "intended to be sold", and in effect treats it as mere redundancy at best. Even if this Court were to accept the District Court's interpretation of Section 1001(g), but give effect to the phrase "intended to be sold", the Court would find that the service area protections would apply to a note intended to be sold to a third party by the Secretary, but ultimately sold to the debtor district under the right of first refusal. This is the same result urged by the Petitioner.

Petitioner submits, though, that the phrase "intended to be sold" clearly expresses Congress' intent to prevent the very ruling that the District Court made. The phrase "intended to be sold" must have been included to emphasize the inclusiveness intended and that a sale to a debtor district should not be treated as automatically extinguishing the note for the purposes of application of 7 U.S.C. § 1926(b).

The Sixth Circuit opinion, merely endorses the District Court opinion as well-reasoned and seemingly adopts the District Court's conclusion that Section 1001(g) only extends the service area protections to third party purchases, without discussing the construction of the statute. Instead, the Sixth Circuit assumes away the issue of the meaning of Section 1001(g) by simply stating, without citation to legal precedent, that a repurchase of its notes by a debtor water district serves to extinguish the debt. In fact, the Sixth Circuit frames the issue before it in those terms. The Court of Appeals then focuses upon only one of the congressional purposes behind the service area protections — enhancement of the ability of the district to repay the debt to the government — and posits a requirement of 7 U.S.C. § 1926(b) that there be an obligation owing to the FmHA. Finally, the Sixth Circuit concludes that this requirement cannot be met in the case of debtor purchases. What this construction ignores, among other things, is that in the third party purchase situation the FmHA is cashed out and there is also no further debt owing to the FmHA. Thus, in the third party situation as well, there is no debt owing to the FmHA for which the congressional purpose to enhance the ability of the district to repay its debt to the government would be served. *See Ute* at pp. 94-95, n. 24 (App., *infra*, 62a). The Sixth Circuit's policy reasoning, then, does not support its decision because the provisions of Section 1001(g) would have equal effect upon third party and debtor water district purchases in terms of continuing the application of 7 U.S.C. § 1926(b) after sale.

Any search for legislative purposes, however, should not focus upon the provisions of 7 U.S.C. § 1926(b), but rather upon § 1001(g) of OBRA. In passing that provision Congress sought to make the notes as attractive as possible in order to enhance the market for the FmHA bonds and therefore maximize net proceeds for the government by continuing the service area protections to enhance the finan-

cial ability of the debtor water district to repay its debt. *Ute*, 960 P.2d at pp. 89-90, nn. 16, 17; 92 (App., *infra*, 49a-50a, 55a). This purpose would be served by continuing the service area protections, regardless of whether a third party or a debtor district purchased the notes. Such continuation would not only enhance the value of the notes to a third party purchaser, but also would make financing the purchase by a debtor water district of its own notes more attractive to a private lender. In essence, the debtor water district does the Secretary's job for him under the OBRA asset sale program by arranging the purchase transaction through acquisition of private financing for the purchase of its own notes.

To the extent that the Sixth Circuit bases the conclusion that a purchase of its notes by a debtor water district under OBRA results in an extinguishment of the debt to the FmHA upon the Secretary of Agriculture's marking Water 1's notes "paid in full" in the purchase transaction (103 F.3d at p. 42 (App., *infra*, 10a)) or its suggestion, in attempting to distinguish the Colorado Supreme Court's decision in *Ute*, that the intent of the parties was not to avoid discharging the instrument (*Id.*), these matters are not properly before it, let alone established, on a motion to dismiss under Federal Rules of Civil Procedure, Rule 12(b)(6). These matters are not alleged in Water 1's pleading. Furthermore, the intent of the parties is uniquely a question of fact, inappropriate for consideration on a motion to dismiss. *See McCormick v. United States*, 500 U.S. 257, 270, 11 S.Ct. 1807, 1815 (1991). To the extent the Sixth Circuit's decision is based upon its view of these facts, it seriously departs from and creates a true, direct and irreconcilable conflict with this Court's precedents. Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 1366 at pp. 483-484 (1990) ("Rule 12(b) is not intended to permit the resolution of disputes . . . when there is a material issue of fact that justifies trial on the merits.")

To the extent that the Sixth Circuit's articulation that the Secretary of Agriculture treated the notes as discharged and that the intent of the parties was not to avoid discharging Water 1's bonds is a determination of and deference to an administrative interpretation of the Secretary of Agriculture, the Sixth Circuit's opinion seriously departs from and creates a true, direct and irreconcilable conflict with this Court's precedents concerning the proper construction of congressional statutes. In essence, from this perspective, the Sixth Circuit's opinion would circumvent this Court's *Chevron* decision and its progeny. Section 1001(g) is not ambiguous. Furthermore, as the District Court pointed out in its opinion (D.C.Op. at p. 14, n. 8. (App., *infra*, 22a-23a)), there is no contemporaneous settled administrative interpretation of Section 1001(g) to which it could defer. *See Good Samaritan Hospital v. Shalala*, 508 U.S. ___, 113 S.Ct. 2151, 2161 ("the consistency of an agency's position is a factor in assessing the weight that position is due"). The lack of such a contemporaneous settled administrative interpretation is exemplified by the divergence of the position taken by the Secretary of Agriculture with respect to Water 1's purchase transaction (marked the bonds "paid in full") and with respect to the Ute Water Conservancy District's purchase transaction (endorsed the bonds over to the district and directed the escrow agent to make payments on the bond to the district), both effected under Section 1001 of OBRA. See n. 5, *supra; Id.* at p. 2161 (citations omitted) (" 'an agency interpretation of a relevant provision which conflicts with the agency's earlier interpretations is "entitled to considerably less deference" than a consistently held agency view' "). If anything, the two purchase transactions demonstrate a willingness of the Secretary of Agriculture to bargain for the manner in which the transaction is treated.

The most important point, however, is that the issue is not the intent of the parties or the intent of the Secretary of Agriculture, or the view of the Sixth Circuit of the effect of

a purchase by a debtor water district of its own bonds, or the policy making determinations of the District Court. Rather, the key inquiry under the settled precedents of this Court is the meaning of the language of Section 1001(g) of OBRA. Section 1001(g) plainly and unambiguously states congressional policy that the service area protections are to continue for the term of any notes sold or even intended to be sold under OBRA, whether the sale is to a third party or to the debtor district. The Secretary of Agriculture is responsible for giving effect to this unambiguously expressed intent of Congress. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, n. 9, 104 S.Ct. 2778, 2781 (1984).

Finally, The Sixth Circuit's acceptance in its opinion of SWI's argument that Water 1's notes were discharged, not sold (103 F.3d at p. 42), is totally antithetical to the plain, unambiguous language of Section 1001, subsections (f) and (g), which repeatedly and solely utilize words of sale or purchase in describing the transaction. Furthermore, the statute does not require any "straw man" arrangement or other fiction, such as the one constructed by the Ute Water Conservancy District and the Secretary of Agriculture, in order for a purchaser district to enjoy continued service area protection.

For these reasons the decision of the Sixth Circuit is in true, direct, and irreconcilable conflict with the relevant decisions of this Court. Given the enormous importance of this issue to hundreds of rural water associations throughout numerous states, primarily in the Midwestern and Southeastern United States, the Sixth Circuit's clearly erroneous decision in this case should not be allowed to stand, but rather, this Court should grant the writ and provide proper guidance to the numerous federal and state courts that are facing or may in the future face the question presented on this Petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

March 18, 1997

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APPENDIX

Judgment of the Sixth Circuit Court of Appeals in *Scioto County Regional Water District No. 1, Authority v. Scioto Water, Inc., et al.*, entered on December 18, 1996 ..... 1a

Opinion of the Sixth Circuit Court of Appeals in *Scioto County Regional Water District No. 1, Authority v. Scioto Water, Inc., et al.*, 103 F.3d 38 (6th Cir. 1996) 2a-10a

Opinion of the District Court for the Southern District of Ohio, Western Division in *Scioto County Regional Water District No. 1, Authority v. Scioto Water, Inc., et al.*, (unreported) 11a-26a

Opinion of the Colorado Supreme Court in *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81 (Colo. 1995) 27a-66a

Opinion of the Colorado Court of Appeals in *City of Grand Junction v. Ute Water Conservancy Dist.*, 870 P.2d 593 (Colo. App. 1993) 67a-78a

Opinion of the Fifth Circuit Court of Appeals in *City of Madison, Mississippi v. Bear Creek Water Association, Inc.*, 816 F.2d 1057 (5th Cir. 1987) 79a-93a

Statutes

Omnibus Budget Reconciliation Act of 1986, § 1001, Publ. No. 99-509, 7 U.S.C. § 1929(a), note 90a-93a

Documents

First Amended Complaint (Verified) for Temporary Restraining Order, Alternately, Preliminary Injunction, Permanent Injunction, and Mandamus Order 94a-115a

Motion for Leave to Supplement Amended Complaint 116a-126a

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 95-3918

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY,
Plaintiff-Appellant,

v.

SCIOTO WATER, INC.; DANIEL R. GLICKMAN, Secretary, U.S. Department of Agriculture,
Defendants-Appellees.

Before: Suhrheinrich and Daughtrey, Circuit Judges; Johnstone, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio at Cincinnati.

THIS CAUSE was head on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

Issued as Mandate: February 10, 1996
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ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
Leonard Green, Clerk

A True Copy.

Attest: /s/ VALERIE FEEL
Deputy Clerk

Filed December 18, 1996
Leonard Green, Clerk
Received February 13, 1997

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY,
Plaintiff-Appellant,
v.
SCIOTO WATER INC. and Daniel R. Gickman, Secretary, United States Department of Agriculture,
Defendants-Appellees.

No. 95-3918.

United States Court of Appeals,
Sixth Circuit.

Argued Oct. 11, 1996.
Decided Dec. 18, 1996.

1. Waters and Water Courses — 202

Agricultural Credit Act of 1987 subsection, providing that Consolidated Farm and Rural Development Act provision protecting federally financed water associations against curtailment shall be applicable to all notes or other obligations sold or intended to be sold under Agricultural Credit Act, did not apply to bond issuer that repurchases its own bonds from Farmers Home Administration (FmHA), effectively extinguishing them and, thus, regional water district was no longer entitled to protection provided by Consolidated Farm and Rural Development Act against curtailment, after district repurchased its own bonds that it had previously issued to FmHA; district's indebtedness to FmHA was marked "paid in full" and debt was thus discharged, not "sold." Consolidated Farm and Rural Development Act. §§ 306(b), 309A, as amended, 7 U.S.C.A. §§ 1926(b). 1929a note.

See publication Words and Phrases for other judicial constructions and definitions.

2. Waters and Water Courses — 182

One of main legislative purposes in enacting Consolidated Farm and Rural Development Act provision protecting federally financed water associations from curtailment was safeguarding Farmers Home Administration (FmHA) loans. Consolidated Farm and Rural Development Act, § 306(b), as amended, 7 U.S.C.A. § 1926(b).

3. Waters and Water Courses — 202

When bond issuer buys back its own bond it had issued to Farmers Home Administration (FmHA) and cancels debt, it no longer qualifies as "debtor" for protection from curtailment under Consolidated Farm and Rural Development Act provision protecting federally financed water associations against curtailment. Consolidated Farm and Rural Development Act, §§ 306(b), 309A, as amended, 7 U.S.C.A. §§ 1926(b), 1929a note.

See publication Words and Phrases for other judicial constructions and definitions.

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Before SUHRHEINRICH and DAUGHTREY, Circuit judges; JOHNSTONE,* District Judge.

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*The Honorable Edward H. Johnstone, United States District Judge for the Western District of Kentucky, sitting by designation.

DAUGHTREY, Circuit Judge.

Scioto County Regional Water District No. 1, Authority, the plaintiff in this action, is a regional water district that has operated in Ohio for 30 years. Although it previously had obtained financing through bonds issued to the Farmers Home Administration, the plaintiff repurchased the bonds and obtained private financing. When the defendant, a competitor, built a wellfield upstream from the plaintiff's wellfield, the plaintiff sought protection against the resulting limitation on its services, citing 7 U.S.C. § 1926(b), a provision in the Consolidated Farm and Rural Development Act that protects federally financed water associations from such competition. The district court, however, dismissed the action under Fed.R.Civ.P. 12(b)(6), finding that the plaintiff lost its statutory protection when it repurchased its Farmers Home Administration bonds and canceled its debt. We find no error and affirm the district court's judgment.

The plaintiff, Scioto County Regional Water District No. 1, Authority, referred to throughout this litigation as "Water 1," is a regional water district that has operated in Ohio since 1966. Defendant Scioto Water is a private, non-profit water supply corporation. Defendant Daniel Glickman is the Secretary of the United States Department of Agriculture, of which the Rural Economic and Community Development Service, formerly the Farmers Home Administration, is an agency.

To obtain funding for its water service, Water 1 issued several million dollars in bonds to the Farmers Home Administration[1] in the late 1960's and early 1970's. In 1969, Scioto Water became a non-profit corporation authorized to

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[1]Although the Farmers Home Administration is now known as the Rural Economic and Community Development Service, for the sake of simplicity, this opinion will refer only to the Farmers Home Administration.

install wells and operate a water distribution system. It, too, was funded with bonds sold to the Farmers Home Administration. Since the early 1970's however, Scioto Water has bought its water from Water 1 in order to supply customers; it does not produce water. In the early 1980's, Water 1 and Scioto Water modified their water purchase agreement to lower Scioto Water's maximum usage. However, as Scioto Water consistently has bought additional water since the date of the agreement, Water 1 has added surcharges to the cost of Scioto Water's additional water.

In 1989, Water 1 participated in a Farmers Home Administration program permitting bond issuers to buy back their government debt for a discounted amount. Water 1 refinanced its obligations through Star Bank and is no longer indebted to the federal government.

In the early 1990's, Scioto Water got approval for Farmers Home Administration loans for development of a wellfield two miles upstream from Water 1's wellfield and for a surface water treatment plant. Water 1 applied for a declaratory judgment, temporary restraining order, and an injunction, alleging that Scioto Water's project will harm Water 1's system and that the competition violates 7 U.S.C. § 1926(b). Water 1 alleged other federal and state law claims that are not at issue. Scioto Water moved to dismiss the complaint, and the district court concluded that it failed to state a claim upon which relief could be granted.

Title 7 U.S.C. § 1926, as part of the Consolidated Farm and Rural Development Act, governs federal loans made to water and waste facilities. Under this provision, the Secretary of Agriculture is authorized to make or insure loans to associations for water conservation, use, development, and

control projects, among other purposes. Section 1926(b) protects borrowing associations by providing that

> [t]he service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise or similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

In *City of Madison, Mississippi v. Bear Creek Water Ass'n,* 816 F.2d 1057, 1060 (5th Cir.1987), the Fifth Circuit explained that there are "two congressional purposes behind § 1926: (1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of such associations (and [Farmers Home Administration's] loans) by protecting them from the expansion of nearby cities and towns."

As part of the Omnibus Budget Reconciliation Act of 1986, the Farmers Home Administration was required to sell some of the bonds it had acquired under the Consolidated Farm and Rural Development Act. *See Wayne v. Village of Sebring,* 36 F.3d 517, 526-7 (6th Cir.1994), *cert. denied,* — U.S. —, 115 S.Ct. 2000, 131 L.Ed.2d 1001 (1995). The Agricultural Credit Act of 1987 then required the Secretary to offer the issuer of such bonds the right to buy them back before the Secretary sold them to a third party. *See* Pub.L. 99-509, § 1001, 100 Stat. 1874, as amended by Pub.L. 100-233, § 803, 101 Stat. 1714 (1988) (*see* 7 U.S.C. § 1929a note "Sale of Rural Development Notes and Other Obligations") (referred to as "sub-

section (f)"). Also within the Agricultural Credit Act of 1987 was a provision known as "subsection (g)," stating that 7 U.S.C. § 1926(b), the curtailment prohibition, "shall be applicable to all notes or other obligations sold or intended to be sold" under the Agricultural Credit Act. *See* 7 U.S.C. § 1929a note ("Applicability of Prohibition on Curtailment or Limitation of Service"). The issue before this court then is whether subsection (g)'s provision that § 1926(b) applies to "all" obligations "sold or intended to be sold" means that § 1926(b)'s protection extends to a bond issuer, such as Water 1, that buys back its own bonds from the Farmers Home Administration, effectively extinguishing them.

This question appears to be one of first impression in the federal courts. The only reported decision directly on point comes from the Supreme Court of Colorado, which addressed this issue in *City of Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81 (Colo.1995). In that case, the rural water district had issued Farmers Home Administration bonds to finance growth in its system. It bought back its own bonds in 1988 pursuant to the same legislation that prompted Water 1's purchase of its bonds. The water district then brought a declaratory judgment action alleging that it maintained the exclusive right to provide water service, and it sought an injunction against the City's efforts to provide water service to annexed areas within the water district. Although the City argued that the water district's bond was discharged when the water district purchased it from the Farmers Home Administration, the Colorado court found that the water district's reacquisition of the bond did not discharge the debt, and that subsection (g) allowed the Farmers Home Administration to sell bonds without eliminating § 1926(b) protection for the issuer. Because subsection (g) extended § 1926(b) protection to "all notes or other obligations sold or intended to be sold" under the Agricultural Credit Act, the court concluded that § 1926(b)

protection should continue even if the bond issuer purchased its own bonds. *Id.* at 92. The court believed that because subsection (f) gave bond issuers the "right of first refusal" before the Farmers Home Administration sold the bonds, and was placed in the same act with subsection (g), that Congress meant to create a "comprehensive scheme" that allowed bond issuers to maintain § 1926(b) protection even after they purchased their own bonds. *Id.* In reaching this conclusion, however, the court carefully observed that state law permitted a bond issuer to reacquire its own bond without extinguishing the debt. *Id.* at 93.

[1] No other court has addressed the issue of whether a bond issuer that repurchases its own bonds may claim continued protection under 7 U.S.C. § 1926(b). In light of this scant case law, the plaintiff argues that bond issuers, such as itself, that exercised their right to buy back their bonds are entitled to the same § 1926(b) curtailment protection that is available to third-party bond purchasers. Water 1 argues that the coupling of subsections (f) and (g) of the Agricultural Credit Act means that the bond issuer's right of first refusal incorporates the right to continued protection against curtailment. It relies on common law, stating that when a seller makes a "unilateral option contract" and receives an offer from a third party, it must make both the price and terms of the offer available to one with a right of first refusal. Citing *W. Texas Transmission, L.P. v. Enron Corp.*, 907 F.2d 1554, 1561-9 (5th Cir.1990), *cert. denied*, 499 U.S. 906, 111 S.Ct. 1105, 113 L.Ed.2d 215 (1991), Water 1 insists that it is therefore entitled to the same § 1926(b) protection that would have been available to a third-party purchaser of its bonds. *W. Texas Transmission*, however, concerned a natural gas supplier's right of first refusal to repurchase a pipeline, and applied Texas law to the terms of a particular contract.

Scioto Water first responds that Water 1 failed to raise the issue of the common law right of first refusal at the trial level and has therefore waived the issue. *Bannert v. Am. Can. Co.*, 525 F.2d 104, 111 (6th Cir.1975), *cert. denied*, 426 U.S. 942, 96 S.Ct. 2662, 49 L.Ed.2d 394 (1976). Then, addressing the merits, Scioto Water argues that Water 1 does not qualify for § 1926(b) protection. It first explains that the main purposes of the Agricultural Credit Act are to protect "the supply of running household water in rural areas" and to protect "the repayment of funds advanced for the implementation of such systems." *Rural Water Dist. No. 3 v. Owasso Utils. Auth.*, 530 F.Supp. 818, 823 (N.D.Okla.1979). It notes that in cases such as *Bear Creek, supra*, and *Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist. No. 2*, 861 F.2d 1211 (10th Cir.1988), *cert. denied*, 490 U.S. 1067, 109 S.Ct. 2068, 104 L.Ed.2d 633 (1989), the infringing cities were found to have violated § 1926(b) only because the protected water districts were indebted to the Farmers Home Administration. Moreover, as the opinion in *Pinehurst Enterprises, Inc. v. Town of Southern Pines*, 690 F.Supp. 444 (M.D.N.C.1988), *aff'd*, 887 F.2d 1080 (4th Cir.1989), makes clear, the first element of a § 1926(b) violation is curtailment or limitation of service provided by a "covered association," and to be covered, the association must be indebted to the Farmers Home Administration.

As well as arguing that Water 1 is not entitled to protection under § 1926(b) itself, Scioto Water contends that the Agricultural Credit Act did not alter Water 1's current ineligibility for curtailment protection. Scioto Water points out that Water 1's indebtedness to the Farmers Home Administration was marked "paid in full" and insists that the debt was thus discharged, not sold. We agree.

Finally, Scioto Water contends, correctly we conclude, that the decision in *Ute Water* is distinguishable. In that

case, the Colorado court found that § 1926(b)'s protection extends to those that buy back bonds only if the bonds are reacquired "with the intent not to discharge the instrument." 900 P.2d at 92. The *Ute Water* court analyzed the question of intent and looked to Colorado law to determine whether the acquisition of a bond discharged the debt. Unlike the loan documents in *Ute Water*, the loan documents in this case were marked "paid in full."

[2, 3] We note that cases brought in federal court under 7 U.S.C. § 1926(b) have consistently emphasized the requirement of federal indebtedness to obtain § 1926(b) protection. When an issuer buys back its own bond and cancels the debt, however, it no longer qualifies as a debtor for § 1926(b) protection. This statutory interpretation is also faithful to one of the main legislative purposes in enacting § 1926(b) — safeguarding Farmers Home Administration loans. Although the government maintains an interest in providing affordable rural water service, its interest in protecting against competition diminishes as its loans are repaid. We also note that Water 1's reliance on the common law "right of first refusal" does not alter this outcome, which must be gleaned from the federal statutes themselves rather than from such sources as Texas common law.

In a well-reasoned opinion, the district court held that 7 U.S.C. § 1929a note, subsection (g), applies only to obligations sold by the Farmers Home Administration to third parties. It therefore concluded that Water 1, having repurchased its own bonds, was no longer entitled to the protection provided by § 1926(b) and had failed to state a claim for relief under that section of Title 7. As a result, the district court entered judgment for defendant Scioto Water. We AFFIRM that judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SCIOTO COUNTY REGIONAL WATER
DISTRICT NO. 1, AUTHORITY
Plaintiff,

v.

SCIOTO WATER, INC., et al.,
Defendants.

ORDER

This matter is before the Court upon the following documents: (1) Application for Preliminary Injunction, Permanent Injunction, and Mandamus Order filed by Plaintiff Scioto County Regional Water District No. 1, Authority (Water 1) (Doc. no. 5), opposing memoranda filed by Defendant Scioto Water, Inc. (SWI) (Doc. no. 17) and Defendant Richard Rominger (Doc. no. 20), and Water 1's reply (Doc. no. 29); (2) Water 1's Application for Temporary Restraining Order Pursuant to Fed. R. Civ. P. 65(b) (Doc. no. 11) and SWI's response (Doc. no. 21); (3) SWI's Motion to dismiss the Complaint (Doc. no. 16), Water 1's opposing memorandum (Doc. no. 28), and SWI's reply (Doc. no. 38); (4) Water 1's Motion for Partial Summary Judgment on Liability Pursuant to 7 U.S.C. §1926(b), as Amended (Doc. no. 27), SWI's response (Doc. no. 37), Rominger's response and counter-motion for summary judgment (Doc. no. 40), Plaintiff's reply (Doc. no. 50); (5) Water 1's Motion for Leave to file Memorandum to the Court With Supplemental Authority to Plaintiff's Previously Filed Motion for Partial Summary Judgment (Doc. no. 35) and SWI's opposing memorandum (Doc. no. 43); (6) Water 1's Motion for Leave to Supplement Amended Complaint (Doc. no. 23), and SWI's opposing memorandum (Doc. no. 33); (7) Plaintiff's Motion for

Leave to Supplement Memorandum in Opposition to Defendant SWI's Motion to Dismiss (Doc. no. 45), and SWI's response (Doc. no. 47); and (8) Plaintiff's Advisory to the Court (Doc. no. 53).

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff has filed an amended complaint in which it alleges a continuing violation by Defendants of 7 U.S.C. § 1926(b), as amended by the Agricultural Credit Act of 1987, P.L. 100-233 § 803(g). Plaintiff claims that this Court has federal jurisdiction under 28 U.S.C. § 1331; the Intergovernmental Cooperation Act, 31 U.S.C. §§ 6501, *et seq.*; the Administrative Procedure Act, 5 U.S.C. § 551; the Federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; and the Mandamus and Venue Act, 28 U.S.C. § 1361. In addition, Plaintiff brings supplemental state law claims. Plaintiff alleges the facts set forth below in support of its federal and state claims.

Plaintiff Water 1 is a regional water district which constitutes a political subdivision of the State of Ohio pursuant to Ohio Rev. Code Ann. § 6119. Water 1 operates under Chapter 61 of the Ohio Revised Code and is regulated by the Ohio Environmental Protection Agency (OEPA). Since its inception in 1966, Water 1 has continuously provided, or made available, wholesale and retail water service within an eight-township area ??? eastern Scioto County, Ohio.

Defendant SWI is a private, non-profit water supply corporation. Defendant Richard Rominger is the Acting Secretary of the United States Department of Agriculture. The Rural Economic and Community Development Service (RECDS), formerly the Farmers Home Administration (FmHA), is an agency of the Department of Agriculture.

Between 1967 and 1973, Water 1 issued and sold to the FmHA bonds in the amount of $2,996,000. In 1975, after

having redeemed the initial bonds, Water 1 issued water refunding bonds in the amount of $2,473,000.

In 1972 SWI sought permission from Water 1 to become Water 1's permittee and to extend Water 1's transmission lines to areas in which Water 1 was obligated to provide service or to make service available. At some point prior to August of 1981, Water 1 and SWI entered into a wholesale water purchase agreement which limited SWI's maximum water usage. Under the agreement, Water 1 was the water producer, wholesale supplier, and retailer, and SWI was the bulk water purchaser and retailer. On August 20, 1981, Water 1 and SWI executed an agreement which modified the existing wholesale water purchase agreement to reduce SWI's maximum usage. The agreement also provided that Water 1 would permit SWI to purchase bulk water from the City of Portsmouth, Ohio, and that Water 1 would purchase from SWI certain water lines owned by SWI. The agreement further provided that Water 1 would guarantee the cost of water to SWI for a period of five years and that Water 1 would serve as an emergency backup supply for SWI in the Wheelersburg, Ohio area.

In 1989, Water 1 took advantage of the FmHA debt buy-out program mandated by Congress pursuant to the Omnibus Budget Reconciliation Act of 1986.[1] Water 1 refinanced its obligations with non-federal funding sources and issued bonds to "buy out" the discounted amount which it would otherwise have owned to the FmHA.[2]

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[1] Pertinent provisions of the Act authorized the FmHA to sell to third parties the types of notes and bonds which Plaintiff had issued and sold to the FmHA or, in the alternative, permitted debtors to secure discounts on their own debt owed to the FmHA by refinancing such debt.

[2] The amended complaint does not include the specific allegations contained in the foregoing sentence. However, it is necessary to set forth

Commencing in 1990-1991, SWI obtained approval of a new FmHA loan and grant for proposed development of a new wellfield two miles upstream from Water 1's wellfield, and for a supporting surface water treatment plant to provide a source of water independent from Water 1. In obtaining the approval, SWI failed to provide direct notice to Water 1 concerning its plans and provided falsified data to FmHA regarding future customer counts. On or about March 1, 1995, OEPA inspected the SWI project as a prerequisite to issuance of an operational permit.

II. CLAIMS OF THE PARTIES

Water 1 alleges that SWI's project will impair its water system. Water 1 further contends that SWI's development of a stand-alone system violates the standing relationship between SWI and Water 1 and that such development is outside the permit, agreements and patterns and practices of the parties. Water 1 also asserts that in reliance upon revenues to be derived from the water purchase contract between the parties, which was to last for a term of 60 years, Water 1 incurred debt to finance expansion of improvements in its wellfield and treatment facility. Water 1 brings the following claims for relief on the above allegations: (1) SWI has violated 7 U.S.C. § 1926(b) by curtailing service provided, or made available, by Water 1 and thereby impairing Water 1's ability to repay its indebtedness; (2) FmHA has violated § 1926(b) by approving and financing the construction of SWI's treatment facilities and thereby impairing Water 1's service and its ability to repay its indebtedness;[3] (3) SWI has violated the Intergovernmental Cooperation

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these facts, which are undisputed, in order to provide a full understanding of the events giving rise to Water 1's claims.

[3]Water 1 moves for partial summary judgment on its claims under § 1926(b) on the ground that it is entitled to protection against curtailment under that provision.

Act, 31 U.S.C. § 6501, *et seq.*, by failing to provide notice to, and consult with, Water 1; (4) SWI's wellfield and facility will unreasonably cause harm to Water 1's wellfield and ground water treatment facility in violation of Ohio's reasonable use of underground or ground water doctrine; and (5) SWI has violated its obligation of good faith in the performance and enforcement of its contract and course of dealing with Water 1 by developing an alternative source of water to replace all, or a substantial part of, the water SWI purchases from Water 1.

Defendant SWI moves to dismiss the complaint on the following grounds: (1) the complaint fails to state a claim upon which relief can be granted; (2) the Court lacks jurisdiction to hear this matter because Water 1 does not have standing to bring this action pursuant to 7 U.S.C § 1926(b)[4]; (3) Water 1 has made no showing of irreparable harm and no showing of an inadequate remedy at law; (4) the complaint and request for injunctive relief is not verified or supported by affidavits; and (5) if the federal claims are dismissed, Water 1's remaining claims should be dismissed because of a lack of ancillary jurisdiction.

III. MOTION FOR LEAVE TO SUPPLEMENT AMENDED COMPLAINT

On May 17, 1995, Water 1 filed a motion for leave to supplement the amended complaint to add as a basis of jurisdiction the All Writs Act, 28 U.S.C. § 1651, *et seq.*; to add a claim for injunctive relief pursuant to the Administrative Procedure Act, 5 U.S.C. § 706; to request a writ of mandamus against Defendant RECDS requiring it to under-

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[4]Although Defendants present this issue as one of standing, the question to be solved is whether Plaintiff has stated a claim for relief under the applicable federal law. Accordingly, the Court will determine whether dismissal is warranted pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim for relief.

take certain actions with regard to Defendant SWI; and to request additional relief. SWI opposes leave to supplement on the ground that there is no authority for Plaintiff to supplement the amended complaint.

Fed. R. Civ. P. 15(d) provides that the court may permit a party to serve a supplemental pleading setting forth events which have happened since the date of the pleading sought to be supplemented. The proposed supplemental amended complaint does not set forth subsequently occurring events. *It should therefore be captioned as a "Motion for Lease to Amend". The Court will grant Water 1 leave to amend pursuant to Fed. R. Civ. P. 15(a) since it has not acted with undue delay or bad faith, and amendment of the complaint at this early stage of the proceedings will not prejudice Defendants.*

IV. MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDA

Water 1 seeks lease to file a supplemental memorandum together with five unpublished judicial decisions in support of its motion for partial summary judgment. The Court finds that Defendants would not be prejudiced by submission of the supplemental authorities. Further, it would serve the interest of justice to have all potentially applicable authorities before the Court for its consideration. Accordingly, lease to file the supplemental memorandum is granted.

Water 1 has also filed a document entitled "Plaintiff's Advisory to the Court", which includes copies of two recently issued judicial decisions. Although Water 1 has not requested leave of court to file the document, leave is required since the filing is an attempt to supplement previously filed memoranda. The Court will grant Water 1 leave to file the document since it will assist the Court to have the most current authorities before it when deciding this case.

Finally, Water 1 requests leave to supplement its memorandum in opposition to SWI's motion to dismiss. For the reasons stated above, Water 1 was granted leave to file the supplemental memorandum.

V. STANDARD OF REVIEW

A Rule 12(b)(6) action to dismiss requires the Court to determine whether a cognizable claim has been pled in the complaint. The basic federal pleading requirement is contained in Fed. R. Civ. P. 8(a), which states that a pleading "shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief". *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). Rule 8(a)(2) operates to provide the defendant with "fair notice of what plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). A Court examines a complaint in light of the objectives of Rule 8 using the standard articulated in *Jones v. Sherrill*, 827 F.2d 1102, 1103 (6th Cir. 1987):

> In reviewing a dismissal under Rule 12(b)(6), the court must accept as true all factual allegations in the complaint. *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir. 1983), *cert. denied*, 469 U.S. 826 (1984). The motion to dismiss must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle her to relief. *Id.* at 158; *Conley v. Gibson*, 355 U.S. 41 (1957).

The admonishment to liberally construe plaintiff's claim when evaluating a Rule 12(b)(6) dismissal does not relieve a plaintiff of his obligation to satisfy federal notice pleading requirements and allege more than bare assertions of legal conclusions. Wright, Miller & Cooper, Federal Practice & Procedure: § 1357 at 596 (1969). "In practice, a complaint . . . must contain either direct or inferential allegations respecting all the material elements to sustain a recovery

under some viable legal theory." *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984), *cert. denied*, 470 U.S. 1054 (1985) (*quoting In Re: Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir. 1981), *cert. dismissed*, 462 U.S. 1125 (1983)); *see also Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984); Wright, Miller & Cooper, Federal Practice & Procedure: § 1216 at 121-23 (1969). The United States Court of Appeals for the Sixth Circuit has clarified the threshold set for a Rule 12(b)(6) dismissal:

> [W]e are not holding the pleader to an impossibly high standard; we recognize the policies behind Rule 8 and the concept of notice pleading. A plaintiff will not be thrown out of court for failing to plead facts in support of every arcane element of his claim. But when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist.

Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 437 (6th Cir. 1988); *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). In its scrutiny of the complaint, a Court construes all well-pled facts liberally in favor of the party opposing the motion. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

VI. OPINION

A. Claim under 7 U.S.C. § 1926(b)

The threshold issue before the Court is whether Water 1 is entitled to the protection of the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.* Title 7 U.S.C. § 1926 governs loans made by RECDS (formerly

the FmHA)[5] to water and waste facilities. Section 1926(a) authorizes the Secretary to make or insure loans to associations to provide for the conservation, development, use, and control of water, among other purposes. Section 1926(b) prohibits the curtailment or limitation of service provided by any such association. Section 1926(b) states as follows:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

The purposes of the statute are twofold: "(1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns." *City of Madison, Miss. v. Bear Creek Water Ass'n., Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987). The federal courts have consistently interpreted § 1926(b) as imposing a brightline rule which prohibits encroachment upon services provided by FmHA-indebted water associations. *Id.* at 1059; *Pinehurst Enterprises, Inc. v. Southern Pines*, 690 F.Supp. 444, 451 (M.D.N.C. 1988), *aff'd. without op.*, 887 F.2d 1080 (4th Cir. 1989). Protection continues during the term of the indebtedness to the FmHA. *Bear Creek*, 816 F.2d at

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[5]For the sake of clarity, the Court will refer to the RECDS as the FmHA throughout this opinion.

1059; *See Glenpool Utility Services Authority v. Creek County Rural Water District No. 2*, 861 F.2d 1211, 1216 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989).

The essential elements of a claim under § 1926(b) are (1) curtailment or limitation of a service, (2) provided by a covered association, (3) having a continued indebtedness under § 1926(b), and (4) having made service available. *Glenpool*, 861 F.2d at 1214; *Pinehurst*, 690 F.Supp. at 451-452.

Under the provisions of the Omnibus Budget Reconciliation Act of 1986 (OBRA), Congress ordered the FmHA to sell to private entities certain FmHA bonds, such as those which Water 1 had issued and sold to the FmHA. *Wayne v. Village of Sebring*, 36 F.3d 517, 526-527 (6th Cir. 1994), *cert. denied*, 115 S.Ct. 2000 (1995). The Agricultural Credit Act of 1987 amended OBRA to require that the Secretary of Agriculture first offer for sale to the issuer any notes or other obligations held under the Consolidated Farm and Rural Development Act. See Pub.L. 99-509, § 1001, 100 Stat. 1874 (1986), as amended by Pub.L 100-233, § 803, 101 Stat. 1714 (1988) (codified at 7 U.S.C. § 1929a note). Subsection (g) of the amendments provides that § 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold under this section".

Water 1 contends that although it refinanced its bonds with non-federal funding sources in 1989 and it is no longer indebted to the FmHA, it remains entitled to the protection of § 1926(b) under the above provisions. Water 1 claims that since FmHA "sold" its bonds to Water 1 under the debt buy-out program, the "sale" brings it within the purview of § 1929a note, subsection (g). Defendants counter that subsection (g) does not apply to obligations which a debtor has bought back from the FmHA at a discount. They claim that because Water 1 is no longer indebted to the FmHA, Water 1 is not entitled to the protections of § 1926(b).

The parties have cited several published and unpublished decisions in support of their respective position.[6] However, many of the cases are of little assistance because either the party that sought the protection of § 1926(b) was not the entity indebted to the FmHA (*see e.c. Pinehurst*, 690 F.Supp. at 452), or the complaining party clearly remained indebted to the FmHA. *See Jennings Water, Inc. v. North Vernon*, 895 F.2d 311 (7th Cir. 1989); *Bear Creek*, 816 F.2d at 1059; *Glenpool*, 861 F.2d at 1211. Further, while many of these cases set forth the proposition that continued indebtedness is a prerequisite to bringing a claim under § 1926(b), the cases do not address the specific issue of whether a party which was originally indebted to the FmHA, but which purchased its loan back at a discount, is entitled to the continuing protection of § 1926(b). Finally, although the United States Court of Appeals for the Sixth Circuit assumed in the case of *Wayne v. Village of Sebring* that the protection of § 1926(b) continued for the plaintiff after the FmHA had sold the plaintiff's bonds to a third party, the Court did not address whether § 1926(b) applies to a debtor who has bought back its own debt. *See Wayne*, 36 F.3d at 527.

The only case cited by the parties that directly addresses the scope of § 1929a note, subsection (g) and provides any supporting analysis is *Ute Water Conservancy District v. City of Grand Junction*, No. 92CA2026 (Colo. Ct. of Appeals, October 21, 1993), *aff'd.*, No. 93SC745 (Colo. Supreme Court, June 30, 1995).[7] The appellate court in *Ute* determined that the plaintiff water district was entitled to protec-

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[6]Defendant has also cited portions of the legislative history. However, the legislative history does not provide any insight with regard to the specific issue before the Court.

[7]While the *Ute* decisions have no precedential value in this district, the Court has examined the decisions in view of the dearth of authorities concerning the scope of § 1929a note.

tion under § 1926(b) even after it had purchased its bond from the FmHA. The court rejected the defendant's position that § 1929a note does not extend the protections of § 1926(b) to debtors who had purchased their own notes at a discount. The court relied on the fact that § 1929a note refers to "*all*" notes and obligations. The Supreme Court of Colorado affirmed the appellate court's decision. It also relied on use of the word "all" in subsection (g) and held that § 1926(b) "applies to all notes and bonds sold by the FmHA — including those reacquired by the issuer with the intent not to discharge the instrument . . ." The court found its interpretation to be consistent with the purposes of the governing legislation.

This Court disagrees with the conclusion that the language of § 1929a note, subsection (g) clearly encompasses those obligations which a debtor has purchased from the FmHA. Although § 1929a note explicitly states that it applies to "all" notes and bonds sold by the FmHA, the statute does not define the term "notes and bonds sold or intended to be sold". Therefore, it is necessary to look beyond the language of subsection (g) in order to determine the meaning of that term.[8]

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[8]Because the language of § 1929a note is not clear, the Court must defer to an interpretation of § 1929a note by the agency charged with its administration, so long as the interpretation is based on a permissible construction of the statute and does not frustrate congressional policy. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *F.E.C. v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 32 (1981); *Wayne*, 36 F.3d at 527. In response to a request for an interpretation of the statute by counsel for Richard Rominger, the Office of General Counsel for the Department of Agriculture issued a letter to counsel stating its opinion that former borrowers who have paid off FmHA loans under the debtor buy-out program are not covered by the protection of § 1926(b). See Defendant Rominger's Response to Plaintiff's Motion for Preliminary Injunction, Exhibit B (Doc. no. 20). While the Court questions whether it must defer to an agency opinion expressed in such an informal manner, the

Upon a careful reading of all the pertinent statutory provisions, the Court concludes that subsection (g) does not apply to obligations which a debtor has purchased from the FmHA under the debtor buy-out program. The applicable loan provisions recognize two types of obligations: (1) those to be sold by the FmHA to third parties under § 1929a note, and (2) those to be offered to issuers for purchase under § 1929a note, as amended. Section 1929a note, as amended, subsection (f) differentiates between "a sale of a portfolio of note or other obligations "under this section" (referring to § 1929a note, which provides only for the sale of FmHA notes to third parties), and on offer to sell to the purchaser, the latter being an alternative which the Secretary must offer before conducting a sale "under this section". Provision (g) employs similar language, referring to "notes or other obligations sold or intended to be sold *under this section.*" (emphasis added). Attributing the same meaning to the phrase under both provisions, the obligations to which (g) refers are those sold to third parties under § 1929a note, as distinguished from those offered for sale back to debtors. Thus construed, § 1929a note, as amended, extends the protections of § 1929(b) only to those obligations sold by the FmHA to third parties pursuant to the dictates of OBRA.

This interpretation of § 1929a note is consistent with the purposes of the statutory scheme. OBRA mandated that the Secretary generate specified net proceeds by selling notes and other obligations held by it. The extension of loan protections to third-party purchasers would assist the Secretary in satisfying the OBRA requirements by offering an inducement for third parties to purchase FmHA obligations. On the other hand, offering the same incentive to debtors

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Court need not resolve this issue. Rather, the Court's interpretation of the statute, based on its independent analysis, is in conformity with the Department of Agriculture's interpretation.

who might wish to participate in the buy-out program would not necessarily further assist the Secretary in fulfilling the statutory mandates. This is so because the buy-out program offers another type of incentive for debtors to purchase their own loans; i.e., a reduction in the amount of debt owed to the FmHA. Accordingly, there is a rational basis for extending the protection of § 1926(b) to obligations sold by the FmHA to third parties, but not to those purchased by debtors through the buy-out program.

In addition, a debtor whose loan is sold by the FmHA to a third party has no control over the transaction and cannot be said to have voluntarily relinquished the benefits conferred by § 1926(b). It is reasonable that Congress desired to extend to a debtor in this situation the same protections the debtor would have received had the FmHA continued to own the debtor's obligation. In contrast, a debtor who opts to purchase its own loan at a discount acts of its own volition and can be said to have voluntarily relinquished any rights bestowed by FmHA ownership of the obligation, including the protection afforded by § 1926(b). These differences afford a rational basis for distinguishing between obligations sold to third parties and those bought back by debtors.

Based on the foregoing, the Court finds that § 1929a note, subsection (g), applies only to obligations sold by the FmHA to third parties. Accordingly, accepting Water 1's allegations as true, its bonds were not "sold or intended to be sold" within the meaning of § 1929a note, subsection (g), so as to entitle Water 1 to the protection against curtailment provided by § 1926(b). Because Water 1 is no longer indebted to the FmHA within the meaning of the pertinent statutory provisions, Water 1 has failed to state a claim for relief under § 1926(b).

B. Claims under Other Federal Statutes

Water 1 brings a claim against the FmHA for violation of the Intergovernmental Operation Act, 31 U.S.C. § 6501. In support of its claim, Water 1 alleges that it had no notice or opportunity to protest SWI's proposed development. However, Water 1 has failed to allege specific facts in support of its claim. Further, §6501 simply defines the terms used in the Act and does not create any substantive rights. Water 1 has failed to specify any other provision of the Act that the FmHA has allegedly violated. Accordingly, this claim must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

Water 1's claim for relief under this Administrative Procedure Act, 5 U.S.C. § 706, must also be dismissed. Section 706 simply sets forth the scope of review of agency action. Water 1 has failed to identify a specific substantive provision of the Act which the FmHA has allegedly violated.

Finally, neither the Federal Declaratory Act, the All Writs Act, nor the Mandamus and Venue Act create substantive rights. Rather, these provisions confer jurisdiction on the district court and create remedies. Water 1 has not alleged a violation of its substantive rights which would confer jurisdiction and entitle it to the relief available under these provisions.

III. STATE LAW CLAIMS

Title 28 U.S.C. § 1367 provides that the district court may decline to exercise supplemental jurisdiction over a claim over which it has not original jurisdiction if the court has dismissed all claims over which it had original jurisdiction. Because the Court is dismissing all of Water 1's claims over which it arguably had original jurisdiction in this case, the Court declines to exercise supplemental jurisdiction over Water 1's state law claims.

CONCLUSION

Plaintiff Water 1 has failed to state a claim for relief under 7 U.S.C. § 1926(b). Water 1 also does not have a claim for relief under the other federal statutes listed in the amended and the second amended complaints. Because Water 1 has failed to state a claim for relief under federal law, the Court declines to exercise supplemental jurisdiction over Water 1's state law claims.

Plaintiff Water 1's motions for leave to file supplemental memoranda and documents (Doc. nos. 35 and 45) and motion for leave to supplement the amended complaint (Doc. no. 23) are hereby GRANTED. Defendant SWI's motion to dismiss (Doc. no. 16) is hereby GRANTED. Plaintiff Water 1's application for injunctive relief (Doc. no. 5), application for a temporary restraining order (Doc. no. 2), and motion for partial summary judgment (Doc. no. 27) are DENIED as moot. This Order does not dispose of Defendant SWI's application for injunctive relief.

IT IS SO ORDERED.

/s/ SANDRA S. BECKWITH
Sandra S. Beckwith, Judge
United States District Court

CITY OF GRAND JUNCTION,
Petitioner/Cross-Respondent,
v.
UTE WATER CONSERVANCY DISTRICT,
Respondent/Cross-Petitioner.

No. 93SC745.

Supreme Court of Colorado,
En Banc.

June 30, 1995.

Water conservancy district brought declaratory judgment action against city, asserting exclusive right to provide water service to areas which lay within boundaries of both district and city. The District Court, Mesa County, David A. Bottger and Nicholas R. Massaro, JJ., held that district was entitled to provide water service to overlap areas, and city appealed. The Court of Appeals, 870 P.2d 593, affirmed in part, vacated in part and dismissed in part. City petitioned for certiorari, and district filed cross-petition. The Supreme Court, en banc, Lohr, J., held that: (1) federal statute prescribing that, during term of bond held by Farmers Home Administration (FmHA), water services provided by borrower cannot be curtailed or limited expressly preempts state law governing authority of public entity to provide domestic water service, and that statute and other applicable federal statutes implicitly preempt state law regulating discharge of debt evidenced by bond; (2) water conservancy district's repurchase of revenue bond from FmHA did not discharge underlying debt and thus, protection of statute prohibiting curtailment or limitation of water services continued beyond date of repurchase; (3) revenue bond was not discharged when district advance refunded bond; and (4) statute affording protection to district did not violate Tenth Amendment.

Affirmed.

[1] STATES — 18.91
360k18.91
Federal statute prescribing that, during term of bond held by Farmers Home Administration (FmHA), water services provided by borrower cannot be curtailed or limited expressly preempts state law governing authority of public entity to provide domestic water service, and that statute and other applicable federal statutes implicitly preempt state law regulating discharge of debt evidenced by bond. U.S.C.A. Const. Art. 6, cl. 2; Agricultural Act of 1961, § 306(b), as amended, 7 U.S.C.A. § 1926(b); Omnibus Budget Reconciliation Act of 1986, § 1001, 7 U.S.C.A. § 1929a note.

[1] WATERS AND WATER COURSES — 202
405k202
Federal statute prescribing that, during term of bond held by Farmers Home Administration (FmHA), water services provided by borrower cannot be curtailed or limited expressly preempts state law governing authority of public entity to provide domestic water service, and that statute and other applicable federal statutes implicitly preempt state law regulating discharge of debt evidenced by bond. U.S.C.A. Const. Art. 6, cl. 2; Agricultural Act of 1961, § 306(b), as amended, 7 U.S.C.A. § 1926(b); Omnibus Budget Reconciliation Act of 1986, § 1001, 7 U.S.C.A. § 1929a note.

[2] STATES — 18.5
360k18.5
"Actual conflict" occurs, for purposes of preemption doctrine, when it is impossible for private party to comply simultaneously with both state and federal laws, or when state law stands as obstacle to accomplishment and execution of full purpose and objective of Congress. U.S.C.A. Const. Art. 6, cl. 2.

[3] STATES 18.11
360k18.11
Federal law expressly preempts state law when statute contains explicit language demonstrating that Congress intended such preemption. U.S.C.A. Const. Art. 6, cl. 2.

[4] STATES — 18.7
360k18.7
Federal law implicitly preempts state law when federal law occupies field, i.e., preemption may be inferred, absent any express statutory language, from scheme of federal regulations so pervasive as to make reasonable inference that Congress left no room for states to supplement it. U.S.C.A. Const. Art. 6, cl. 2.

[5] STATES — 18.11
360k18.11
In order to ascertain whether federal statute implicitly preempts state law, court must determine intent of Congress in enacting federal law. U.S.C.A. Const. Art. 6, cl. 2.

[6] WATERS AND WATER COURSES — 202
405k202
Water conservancy district's repurchase of revenue bond from Farmers Home Administration (FmHA) did not discharge underlying debt, particularly given evidence that neither FmHA nor district intended to discharge or cancel bond and, thus, protection of federal statute prohibiting curtailment or limitation of water services provided by borrower continued beyond date of repurchase; statutory language extending protections of statute to "all" obligations sold by FmHA included reacquisition by issuer when parties intended bond to remain outstanding, and, under common-law principles, intent of parties dictated whether reacquisition of bond that was also negotiable instrument discharged debt or functioned simply as purchase and sale of instrument. Agricultural Act of 1961, § 306(b), as amended, 7

U.S.C.A. § 1926(b); Agricultural Credit Act of 1987, § 803(f, g), 7 U.S.C.A. § 1929a note.

See publication Words and Phrases for other judicial constructions and definitions.

[7] STATUTES — 188
361k188
When interpreting federal statute, courts first look to language of statute.

[8] STATUTES — 190
361k190
When Supreme Court's reading of statute is consistent with legislative history and purpose, no "rare and exceptional circumstances" exist for purposes of exception to general rule that when court finds terms of statute unambiguous, judicial inquiry is complete.

See publication Words and Phrases for other judicial constructions and definitions.

[9] STATUTES — 199
361k199

Word "all," for purposes of statutory construction, is unambiguous term.

See publication Words and Phrases for other judicial constructions and definitions.

[10] BONDS — 68
58k68
Under common-law principles, intent of parties dictates whether reacquisition by issuer of bond that is also a negotiable instrument discharges debt or functions simply as purchase and sale of instrument.

[11] UNITED STATES — 53(7)
393k53(7)
Federal statute providing that Secretary of Agriculture and subsequent purchasers of notes and other obligations sold by Secretary on nonrecourse basis shall be relieved of any responsibilities that might have been imposed had borrower remained indebted to Secretary relieves purchaser of note or bond held by Farmers Home Administration (FmHA) from any special obligation that FmHA had to borrower, but does not relieve borrower from obligation to repay debt. Agricultural Act of 1961, § 309A(e), as amended, 7 U.S.C.A. § 1929a(e).

[12] APPEAL AND ERROR — 1008.1(8.1)
30k1008.1(8.1)
Determining intent of parties involves factual finding that should not be disturbed on appeal unless clearly erroneous.

[13] WATERS AND WATER COURSES — 202
405k202
Revenue bond issued by water conservancy district to Farmers Home Administration (FmHA) was not discharged when district advance refunded bond, as would have terminated outstanding debt required for protections of federal statute prescribing that, during term of bond held by FmHA, water services provided by borrower could not be curtailed or limited; in altering source of repayment for revenue bond, district did not discharge its underlying obligation to repay FmHA. Agricultural Act of 1961, § 306(b), as amended, 7 U.S.C.A. § 1926(b).

[14] BONDS — 105
58k105
Advance refunding does not eliminate bond holder's fundamental right to payment on bond.

[15] WATERS AND WATER COURSES — 202
405k202
Statute prescribing that during term of bond held by Farmers Home Administration (FmHA) water services provided by borrower cannot be curtailed or limited required only that bond issued by water conservancy district to FmHA be outstanding, not that district be indebted to federal government. Agricultural Act of 1961, § 306(b), as amended, 7 U.S.C.A. § 1926(b).

[16] STATES — 4.16(l)
360k4.16(l)
Federal statute prescribing that during term of bond held by Farmers Home Administration (FmHA) water services provided by borrower cannot be curtailed or limited did not violate Tenth Amendment even where protection of statute was extended beyond water conservancy district's repurchase of bond from FmHA; federal interest of encouraging rural water districts to provide their services to rural residents through United States exists even after FmHA has sold bond issued by such district, and monopoly granted to conservancy district by statute was limited in time and geographic scope. U.S.C.A. Const.Amend. 10; Agricultural Act of 1961, § 306(b), as amended, 7 U.S.C.A. § 1926(b).

[16] WATERS AND WATER COURSES — 182
405k182
Federal statute prescribing that during term of bond held by Farmers Home Administration (FmHA) water services provided by borrower cannot be curtailed or limited did not violate Tenth Amendment even where protection of statute was extended beyond water conservancy district's repurchase of bond from FmHA; federal interest of encouraging rural water districts to provide their services to rural residents through United States exists even after FmHA has sold bond issued by such district, and monopoly granted to

conservancy district by statute was limited in time and geographic scope. U.S.C.A. Const.Amend. 10; Agricultural Act of 1961, § 306(b), as amended, 7 U.S.C.A. § 1926(b).

*83 Daniel E. Wilson, City Atty., City of Grand Junction, John P. Shaver, Asst. City Atty., Grand Junction, Grimshaw & Harring, P.C., Wayne B. Schroeder, Ronald L. Fano, Peter J. Whitmore, Denver, for petitioner/cross-respondent.

Williams, Turner & Holmes, P.C., Mark A. Hermundstad, William D. Prakken, Grand Junction, for respondent/cross-petitioner.

Geoffrey T. Wilson, Gen. Counsel, Colorado Municipal League, Denver, for amicus curiae Colorado Municipal League.

Justice LOHR delivered the Opinion of the Court.

The issues in this case arise out of a dispute between the Ute Water Conservancy District (District) and the City of Grand Junction (City) as to which entity has the authority to provide water to domestic water users in areas where the boundaries of the City and the District overlap. The primary issue in this case is whether a bond — originally issued by the District to the Farmers Home Administration (FmHA), an agency of the United States Department of Agriculture, and subsequently reacquired by the District — satisfies the outstanding debt requirement of the applicable federal statute, 7 U.S.C. § 1926(b) (1994). If the bond is still outstanding, section 1926(b) protects the District from competition and prevents the City from supplying water to domestic water users in the overlap areas, except to those domestic water consumers historically served by the City.

In a declaratory judgment action brought by the District, the Mesa County District Court held that the bond remained outstanding, with the result that the District is protected from competition by the City in the overlap areas

pursuant to section 1926(b). The district court rejected the District's alternative argument that it is a "municipality" for purposes of section 31-35-402(1)(b), 12B C.R.S. (1986), and therefore enjoys protection from competition by the City under that statute. On appeal, the Colorado Court of Appeals affirmed the trial court's judgment for the District based on section 1926(b) and vacated the trial court's ruling on the section 31-35-402(1)(b) issue as premature. Ute Water Conservancy Dist. v. City of Grand Junction, 870 P.2d 593 (Colo.App.1993). We granted certiorari to review the correctness of the court of appeals' resolution of those issues [FN1] and now affirm the judgment of the court of appeals.

> FN1. The City sought review of the § 1926(b) determination, and the District cross-petitioned for review of the ruling concerning § 31-35-402(1)(b). We granted certiorari on the following issues: Issues raised by petitioner City: 1. Whether the defeasance, payment, cancellation of indebtedness and purchase of a bond by its issuer, result in the discharge of the "underlying debt" to the bondholder, even though the purchase of the bond was structured by the issuer with the intent to preserve the "underlying indebtedness" to the bondholder. 2. Whether the protection of 7 U.S.C. § 1926(b) (1994) extends to a district which has purchased, paid and canceled its indebtedness on a defeased bond to Farmers Home Administration in a transaction structured by the District with the intent to preserve the "underlying indebtedness" to FmHA. 3. Whether the application of 7 U.S.C. § 1926(b) under the facts of this case violates the Tenth Amendment to the United States Constitution. Issues raised by cross-petitioner District: 4. Whether the District is a "municipality" for purposes of § 31-35-402(1)(b), 12B C.R.S. (1986), which provides that one municipality shall not furnish water service in

another municipality without the other municipality's consent. 5. Whether, under § 31-35-402(1)(b), 12B C.R.S. (1986), and other applicable Colorado law, the District has the exclusive right to provide water service to the areas that are included within both the District's boundaries and the City's boundaries.

*84 I.

The District, a water conservancy district that is a political subdivision of the State of Colorado, was created by decree of the District Court of Mesa County in 1956 in order to provide water service to domestic water users in an area surrounding the City. [FN2] See the Water Conservancy Act, §§ 37-45-101 to -153, 15 C.R.S. (1990 & 1994 Supp.) (providing for the creation and operation of water conservancy districts). Prior to the creation of the District, it was difficult for people in rural areas of Mesa County to obtain domestic water service. These people were forced to haul their water in tanks and store it in cisterns. Other rural residents who lived closer to the City were able to receive water from the City's system, but it was expensive and the service was inadequate. A group of residents who lived outside the City organized and created a water conservancy district in order to provide domestic water service in areas where service was lacking or deficient. The District first provided water service in 1964.

FN2. The parties entered into a Stipulation to Facts, dated September 30, 1991, which, together with the pleadings and testimony at trial, provide the basis for our factual background.

When the District was created in 1956, it surrounded the City but it did not overlap the City's boundaries. As the City expanded, however, the City annexed certain areas served by the District. We refer to these areas within the geographic boundaries of both the District and the City as

"overlap areas." In order to resolve conflicts as to which entity would provide water to consumers in overlap areas, the District and the City entered into two written agreements, in 1967 and 1976. [FN3] These agreements, however, failed to resolve the continuing disputes between the District and the City. Except for historical City service areas, the District has provided water to all new consumers in the overlap areas since 1967.

> FN3. The 1976 agreement was identical to the 1967 agreement, except for one paragraph dealing with bulk water rates, which is not directly relevant to the present dispute. The 1976 agreement (hereinafter referred to as the "Agreement") was operative when this litigation was initiated.

In order to keep pace with rapid growth, the District made various improvements to its system, and financed them through borrowings including loans evidenced and secured by the issuance of revenue bonds. In 1981, the district issued one such revenue bond, in the original principal amount of $3 million, to the FmHA. [FN4] The bond matures in 2021. The District subsequently conducted two transactions involving this 1981 revenue bond that form the basis of the City's contention that the obligation of the District on the bond has been discharged.

> FN4. For ease of reference, we refer to this bond as the "1981 revenue bond" throughout the opinion.

First, in 1983, the District refinanced the 1981 revenue bond through a transaction referred to as an "advance refunding" — whereby new bonds were sold and the proceeds of these new bonds were deposited in an escrow account and were used to pay the installments of principal and interest on the 1981 *85 revenue bond as they came due. The escrowed bond proceeds replaced the District's revenues as the security for the 1981 revenue bond, while

the District's revenues became the security for the new bonds.

Second, in 1988, the District reacquired the 1981 revenue bond from the FmHA pursuant to revenue generating legislation enacted by Congress, authorizing the FmHA to sell all notes and bonds in its possession without canceling the protection provided to rural water districts and their lenders under section 1926(b), which prescribes that during the term of a bond held by the FmHA the water services provided by a borrower cannot be curtailed or limited, [FN5] If the District, as the issuer of the bond, was allowed to reacquire the bond from the FmHA without discharging the debt, the District would remain under the protection of 7 U.S.C. § 1926(b) until the bond obligation is discharged or the bond reaches maturity in 2021.

> FN5. The Omnibus Budget Reconciliation Act of 1986 (OBRA), Pub.L. No. 99-509, § 1001, 100 Stat. 1874 (1986) (codified at 7 U.S.C. § 1929a note (1994)), directed the FmHA to sell notes and bonds in its possession in order to lower the federal deficit without removing the protection provided for rural water districts and their lenders under § 1926(b). The Agricultural Credit Act of 1987 (ACA), Pub.L. No. 100-233, § 803, 101 Stat. 1714 (1988) amended § 1001 of OBRA by adding new subsections (f) and (g). See ACA, §§ 803(f) & (g), 101 Stat. 1714 (codified at 7 U.S.C. § 1929a note (1994)). The new subsection (g) states that 7 U.S.C. § 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold under this section." ACA, § 803(g), 101 Stat. 1714 (codified at 7 U.S.C. § 1929a note (1994)). See Part II, infra, for a more detailed discussion.

In 1991, the District filed a complaint against the City in Mesa County District Court, seeking declaratory relief in

the form of a determination that the District was the only entity authorized to provide water to domestic water users in the overlap areas, except where the City historically has served consumers. The District asserted, among other things, that under the Agreement and, alternatively, under applicable Colorado law, the District was authorized to provide domestic water service in the overlap areas. [FN6] The City filed an answer and counterclaim asserting, among other things, that the District could not serve water in the overlap areas without the City's consent, citing section 31-35-402(1)(b), 12B C.R.S. (1986). The City further alleged that the District was obligated under the Agreement to sell certain facilities to the City. Alternatively, the City claimed that it could terminate the Agreement upon ninety days notice. [FN7] Both the City and the District relied upon the Agreement and Colorado law — specifically sections 31-35-401 to -417, 12B C.R.S. (1986 & 1994 Supp.), which govern a municipality's authority to provide water and sewage services — as the bases for their claims that each had the exclusive right to provide water in the overlap areas.

> FN6. In its memorandum brief in support of its motion for summary judgment, the District asserted that 7 U.S.C. § 1926(b) also prevented the City from competing with the District while the 1981 revenue bond remained unpaid.
>
> FN7. The district court agreed with the City and held that the City could terminate the Agreement as of December 31, 1992. The District did not appeal this determination. As conceded at oral argument, the City terminated the Agreement in 1992 during this litigation.

The District filed a Motion for Temporary Restraining Order and/or Preliminary Injunction, asserting that the City should be prohibited from providing domestic water service to new customers in the overlap areas, except those areas

served by the City prior to 1967. After a hearing, the district court denied the District's motion in an order dated January 10, 1992, because the District failed to demonstrate a danger of irreparable injury.

Upon the filing of cross-motions for summary judgment, the district court determined that the District was not a "municipality" under section 31-35-402(1) and thus it could not rely on that statute. [FN8] The district court #86 also concluded that the City was a "municipality" and the District must therefore obtain the City's consent before serving domestic water consumers in the overlap areas. The district court further ruled that there were disputed issues of fact relating to the applicability of 7 U.S.C. § 1926(b) and set those issues for trial. Specifically, the district court stated that "[i]f it is determined upon a hearing of this matter that there is any outstanding federal debt, 7 U.S.C. 1926(b) prohibits the curtailing of any service provided by a water district that is the recipient of federal funds."

> FN8. Section 31-35-402(1)(b) provides that a "municipality" has the following power: To operate and maintain water facilities or sewerage facilities or both for its own use and for the use of public and private consumers and users within and without the territorial boundaries of the municipality, but no water service or sewerage service or combination of them shall be furnished in any other municipality unless the approval of such other municipality is obtained as to the territory in which the service is to be rendered. § 31-35-402(1)(b), 12B C.R.S. (1986) (emphasis added).

The district court conducted a bench trial on several issues, including the applicability of the federal statute. Richard E. Mitchell (Mitchell), the District's bond counsel, testified as an expert witness in the fields of municipal finance and corporate finance. Mitchell testified that he represented the District in six bond transactions between

1980 and 1987, as well as in the District's reacquisition of the 1981 revenue bond. According to Mitchell, who structured the advance refunding transaction in 1983, the District remained liable if the escrow account was insufficient to make the requisite payments on the 1981 revenue bond. Mitchell further testified that in 1988, the District reacquired the bond from FmHA at the discounted price of approximately $1.5 million, but expressly structured the transaction to prevent a merger and to keep the bond outstanding, rather than simply extinguishing the debt. Mitchell testified that the transaction was structured in this manner in order to maintain the District's flexibility to sell the bond again in the future.

Upon conclusion of the bench trial, in an order dated July 17, 1992, the district court held "that 7 U.S.C. 1926(b) prohibits the City from providing water service to the overlap areas so long as the District's 1981 water revenue bond remains outstanding, which may be until July 1, 2021 (Exhibit 98)." [FN9] The district court "permanently enjoined the City from performing any act with respect to the District in violation of 7 U.S.C. 1926(b) . . . for the life of the subject debt." [FN10] The district court determined that the 1981 revenue bond was outstanding, expressly relying on the federal statutes and the expert testimony of Mitchell. The district court also found that "[t]he evidence is undisputed that in buying its bond from FmHA the District intended that the debt remain outstanding so the bond could be resold if necessary." The district court, however, rejected the District's argument that it was a "municipality" under section 31-35-402(l)(b) and therefore enjoyed the protections provided by that statute. The City appealed the district court's decision that 7 U.S.C. § 1926(b) applies in the present case. The District cross-appealed, contending, among other things, that the district court's determination on summary judgment that it was not

a "municipality" under section 31-35-402(1)(b) was erroneous.

FN9. The other issues resolved by the district court in its order dated July 17, 1992, are not before us.

FN10. In an order dated September 11, 1992, the district court denied the City's Motion to Amend Findings and Judgment, emphasizing that "in the event of any conflict between 7 U.S.C. 1926(b) and any contract provision or city ordinance, the former controls[.]" The district court also refused to address four additional issues related to 7 U.S.C. § 1926(b) raised for the first time by the City in its Motion to Amend Findings and Judgment, including the argument that the statute violates the Tenth Amendment to the United States Constitution.

The court of appeals affirmed the trial court's ruling that the District was entitled to the protection afforded by 7 U.S.C. § 1926(b) against the City's efforts to provide water in the overlap areas. Ute Water Conservancy Dist. v. City of Grand Junction, 870 P.2d 593 (Colo.App.1993). The court of appeals vacated the portion of the district court's summary judgment order dealing with the applicability of section 31-35-402(1) because consideration of that issue was premature and presented no justiciable controversy. Id. at 598-99. The City petitioned this court for certiorari to review the applicability of 7 U.S.C. § 1926(b) to the present case. [FN11] The District filed a crosspetition to review the *87 section 31-35-402(1)(b) issue. [FN12] We granted the petition and the cross-petition.

FN11. See issues 1 to 3, supra n. 1.

FN12. See issues 4 and 5, supra n. 1.

The City contends that the lower courts erred in finding that 7 U.S.C. § 1926(b) prohibits it from supplying water to

consumers in the overlap areas because the indebtedness required by section 1926(b) was discharged when the District purchased the bond from the FmHA in 1988 or, alternatively, when the District advance refunded the bond in 1983. The City also asserts that the court of appeals erred in implicitly ruling that section 1926(b) preempts state law. Finally, the City argues that under the facts of this case, 7 U.S.C. § 1926(b) violates the Tenth Amendment to the United States Constitution. We address each of the City's arguments in turn.

II.

[1] The City first contends that the court of appeals erred in implicitly finding that the federal statutes preempt state law in resolving the present dispute. Contrary to the City's contention, we hold that the applicable federal statutes preempt state law in this case. [FN13] More precisely, we hold that: (1) section 1926(b) expressly preempts state law governing the authority of a public entity to provide domestic water service; and (2) section 1926(b) and other applicable federal statutes implicitly preempt state law regulating the discharge of debt evidenced by a bond.

> FN13. State common-law principles, however, also support our conclusion that the 1981 revenue bond remains outstanding. See Part III, infra, for a more detailed discussion.

[2][3][4] The preemption doctrine originates in the Supremacy Clause of the United States Constitution, which provides:

> This constitution, and the laws of the United States which shall be made in pursuance thereof . . .) shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding.

U.S. Const. art. VI, cl. 2. We have recognized that federal law preempts state law when: (1) the federal law actually conflicts with state law; (2) the federal law expressly preempts state law; or (3) the federal law implicitly preempts state law. Banner Advertising, Inc. v. City of Boulder, 868 P.2d 1077, 1080-84 (Colo.1994); see also Cipollone v. Liggett Group, Inc., — U.S. — , — , 112 S. Ct. 2608, 2617-18, 120 L.Ed.2d 407 (1992). [FN14] Actual conflict occurs when it is impossible for a private party to comply simultaneously with both state and federal laws, see Banner, 868 P.2d at 1080, or when the state law stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress. See, e.g., Ray v. Atlantic Richfield Co., 435 U.S. 151, 158, 98 S.Ct. 988, 994-95, 55 L.Ed.2d 179 (1978); Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941); Evans v. Board of County Comm.'rs of County of Boulder, 994 F.2d 755, 760 (10th Cir.1993); Belgard v. United Airlines, 857 P.2d 467, 469 (Colo.App.1992), cert. denied sub nom. Belgard-Krause v. United Airlines, — U.S. — , 114 S.Ct. 1066, 127 L.Ed.2d 386 (1994). Federal law expressly preempts state law when the statute contains explicit language demonstrating that Congress intended such preemption. E.g., Cipollone, — U.S. at — 112 S.Ct. at 2617-18; see also Jones v. Rath Packing Co., 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604 (1977), reh'g denied, 431 U.S. 925, 97 S.Ct. 2201, 53 L.Ed.2d 240 (1977). Finally, federal law implicitly preempts state law when federal law occupies the field — that is to say, preemption may be inferred, absent any express statutory language, from a " 'scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.' " Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982) (quoting Rice v. Santa Fe Elevator *88 Corp., 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed, 1447 (1947)).

Implied preemption also exists when " 'the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.' " Id. However, " '[t]he exercise of federal supremacy is not lightly to be presumed.' " New York Dept. of Social Services v. Dublino, 413 U.S. 405, 413, 93 S.Ct. 2507, 2513, 37 L.Ed.2d 688 (1973) (quoting Schwartz v. Texas, 344 U.S. 199, 202-03, 73 S.Ct. 232, 235, 97 L.Ed. 231 (1952)); accord Rosa v. Warner Elec. Contracting, 870 P.2d 1210, 1212 (Colo.1994), cert. denied, — U.S —, 115 S. Ct. 69, 130 L.Ed.2d 25 (1994).

> FN14. The federal courts generally have been less rigid in classifying the various types of preemption. For example, the United States Supreme Court has recognized that "[i]n the final analysis, there can be no one crystal clear distinctly marked formula [to analyze federal preemption cases]." Hines v. Davidowitz, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941).

We begin our preemption analysis by examining section 1926(b), which expressly preempts state law to the extent that the statute protects the indebted entity from competition while the debt is outstanding. Section 1926(b) states:

> The service provided or made available through any such association [[FN15]] shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such [FmHA] loan [to the District] . . .

> FN15. An "association" is an entity that has received a loan from the FmHA. Ute Water Conservancy Dist.,

870 P.2d at 596. See Part III, infra, for a more detailed discussion.

Consolidated Farm and Rural Development Act, Pub.L. No. 87-128, § 306, 75 Stat. 308 (1961) (codified at 7 U.S.C. § 1926(b) (1994)) (emphasis added). Thus, the language of section 1926(b) prohibiting an entity from curtailing or limiting the District's services expressly preempts state law governing the authority of a public entity to provide domestic water service. We must next determine whether the applicable federal law in the present case, including section 1926(b), implicitly preempts state commercial law on discharge of obligations on a bond.

[5] In order to ascertain whether a federal statute implicitly preempts state law, a court must determine the intent of Congress in enacting the federal law. See, e.g., Rosa v. Warner Elec. Contracting, 870 P.2d at 1212. Moreover, if a federal statute does not expressly preempt state law, "such an intention may be clear from the pervasiveness of the federal regulatory scheme, the need for national uniformity, or the danger of conflict between the enforcement of state law and the administration of federal programs." Rocky Mtn. Airways, Inc. v. Pitkin County, 674 F.Supp. 312, 319 (D.Colo.1987) (citing Pennsylvania v. Nelson, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640 (1956)). We conclude that the legislative history of section 1926(b), the pervasiveness of the federal regulatory scheme, and the need for national uniformity support our conclusion that the applicable federal statutes preempt state law on discharge of bond obligations in the present case.

The legislative history of section 1926(b) demonstrates that Congress intended to protect rural water districts from competition in order to encourage rural water development. Senate Report No. 566, constituting part of the legislative history of section 1926(b), states:

> Section 306 [now codified as section 1926(b) would authorize loans to nonprofit associations and public or quasi-public agencies — for the conservation, development, use and control of water. . . . Under the Water Facilities Act, financial assistance is authorized to governmental and other agencies and to other persons. . . . However, the Water Facilities Act requires the benefits of such loans to be on farms. By interpretation, loans to associations cannot now be made unless a major part of the use of the facility is to be by farmers. This section would broaden the utility of this authority somewhat by authorizing loans to associations serving farmers, ranchers, farm tenants, and other rural residents. This provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, the cost per user is reduced and the loans are more secure in addition to the community *89 benefits of a safe and adequate supply of running household water. A new provision [7 U.S.C. § 1926(b)] has been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.

S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S.C.C.A.N. 2243, 2309 (emphasis added). Federal courts have concluded that "[t]his history indicates two congressional purposes behind § 1926: (1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and (2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns. "City of Madison, Mississippi v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057,

1060 (5th Cir. 1987); see also Jennings Water, Inc. v. City of N. Vernon, Indiana, 895 F.2d 311, 315 (7th Cir.1989), aff'g 682 F.Supp. 421 (S.D.Ind.1988); Moore Bayou Water Ass'n, Inc. v. Town of Jonestown, Mississippi, 628 F.Supp. 1367, 1370 (N.D.Miss.1986). Furthermore, courts have recognized that "[t]he statute's legislative history confirms that the Congress intended a broad reading for section 1926(b)." Jennings Water, Inc., 895 F.2d at 315; accord North Shelby Water Co. v. Shelbyville Mun. Water & Sewer Comm'n, 803 F.Supp. 15, 21 (E.D.Ky.1992). Therefore, the legislative history of section 1926(b) demonstrates that Congress enacted this statute in order to protect rural water districts, as well as loans made to those districts, and supports our conclusion that Congress implicitly intended to preempt any state law that intrudes into this field of federal interest. We next examine the other applicable federal statutes and conclude that they also implicitly preempt state law.

The pervasiveness of the federal regulatory scheme governing the sale of bonds held by the FmHA demonstrates that Congress intended that these federal laws preempt state laws governing bond redemption. As part of an overall effort to reduce the federal deficit, Congress enacted section 1001 of the Omnibus Budget Reconciliation Act of 1986 (OBRA). This statute, in pertinent part, states:

> (a) Sales Required. — The Secretary of Agriculture . . . shall sell notes and other obligations held in the Rural Development Insurance Fund established under section 309A of the Consolidated Farm and Rural Development Act in such amounts as to realize net proceeds to the Government of not less than [specified amounts in specified years].

Omnibus Budget Reconciliation Act of 1986, Pub.L. No. 99-509, § 1001, 100 Stat. 1874 (1986) (codified at 7 U.S.C. § 1929a note (1994)). Congress subsequently en-

acted section 803 of the Agricultural Credit Act of 1987 (ACA), which amended section 1001 of OBRA by adding new subsections (f) and (g). Subsections (f) and (g) state, in relevant part:

> (f) Right of First Refusal. —
>
> (1) In General. — Before conducting a sale of a portfolio of notes or other obligations under this section, the Secretary of Agriculture shall —
>
> (A) determine whether the issuer of any unsold note or other obligation desires to purchase the note or other obligation; and
>
> (B) if so, hold open for 30 days, an offer to sell the note or other obligation to the issuer at a price to be determined under paragraph (2).
>
> ....
>
> (g) Applicability of Prohibition on Curtailment or Limitation of Service. — Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b)) shall be applicable to all notes or other obligations sold or intended to be sold under this section.

The Agricultural Credit Act of 1987, Pub.L. No. 100-233, § 803, 101 Stat. 1714 (1988) (codified at 7 U.S.C. § 1929a note (1994)) (emphasis added). We conclude that Congress intended that this type of pervasive statutory scheme — which provides the issuer with a right of first refusal and expressly applies the provisions of section 1926(b) for protection against curtailment or limitation of *90 service to "all notes or other obligations sold or intended to be sold under this section, — preempt state law pertaining to the sale of bonds held by the FmHA.

Moreover, Congress surely did not intend to allow each state to decide independently whether a bond held by the FmHA would be discharged upon advance refunding or

reacquisition by the issuer under that particular state's version of the Uniform Commercial Code. The Congressional purpose underlying section 1926(b) is to protect rural water districts, which should include all rural water districts, not just those districts in states with favorable versions of the Uniform Commercial Code . The other such purpose is to protect federal loans to those districts. [FN16] Thus, the federal government has an interest in regulating FmHA loans and the bonds that evidence the district's obligations for such loans, and in ensuring uniform treatment in every state for purchasers and issuers of those bonds. [FN17] Therefore, the pervasiveness of the federal regulations and the need for national uniformity provide further support for our conclusion that Congress intended that the applicable federal statutes preempt state law on bond redemption in the present case.

FN16. Additionally, in enacting the comprehensive ACA, Congress intended to facilitate the sale of FmHA loans in a secondary market. See pp. 26-27, infra.

FN17. This is somewhat analogous to the federal government's interest in regulating federal bonds, which has been held to preempt state laws that interfere with the federal regulations. See, e.g., Free v. Bland, 369 U.S. 663, 669, 82 S.Ct. 1089, 1093-94, 8 L.Ed.2d 180 (1962). In that case, the Court held that federal regulations concerning a right of survivorship in United States savings bonds preempted conflicting state community property law provisions. The Court stated: "The success of the management of the national debt depends to a significant measure upon the success of the sales of the savings bonds. The Treasury is authorized to make the bonds attractive to savers and investors." Id. (footnote omitted). Although the United States Government was not the bond issuer in the present

case, Congress enacted revenue generating legislation designed to reduce the federal deficit by encouraging the FmHA to sell bonds and notes in its possession.

III.

The City contends that the 1981 revenue bond is no longer outstanding and thus the District is no longer protected by section 1926(b). We begin our analysis of this issue by examining 7 U.S.C. § 1926(b), which states:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association [the District] within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such [FmHA] loan [to the District]; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

Consolidated Farm and Rural Development Act, Pub.L. No. 87-128, § 306, 75 Stat. 308 (1961) (codified at 7 U.S.C. § 1926(b) (1994)) (emphasis added). Therefore, to receive the protection of this statute the District must be an "association" and the FmHA loan must be outstanding.

The City does not dispute that the District is an "association" under section 1926(b). Ute Water Conservancy Dist., 870 P.2d at 596; see Pinehurst Enterprises, Inc. v. Town of S. Pines, 690 F.Supp. 444, 452 (M.D.N.C.1988) (defining "any such association" under 7 U.S.C. § 1926(b) as "an entity which has received a loan from the Secretary (FmHA)"), aff'd, 887 F.2d 1080 (4th Cir.1989) (without published opinion). Rather, the City contends that the District lost the protection afforded under this statute either

when it repurchased the 1981 revenue bond from the FmHA in 1988, or advance refunded the 1981 revenue bond in 1983. The City's contention is based on the premise that either of these two transactions was sufficient to discharge the 1981 revenue bond under state law, thereby terminating the requisite outstanding debt under section 1926(b). For the reasons stated below, we disagree.

*91 A.

[6] The City first contends that the underlying debt evidenced by the 1981 revenue bond was discharged when the District repurchased the bond from the FmHA in 1988. The City argues that under the Uniform Commercial Code (UCC), as adopted in Colorado, and state common law, the underlying debt was discharged when the District repurchased the 1981 revenue bond. [FN18] Contrary to the City's position, however, the applicable federal statutes, as well as state common-law principles support the court of appeals' conclusion that the District's reacquisition of the 1981 revenue bond did not discharge the underlying debt.

> FN18. More precisely, the City contends that Article 3 of the UCC should be looked to for guidance on the issue of discharging a bond because Article 8 of the UCC, which deals with securities, is silent on this issue. See E.F. Hutton & Co. v. Manufacturers Nat'l Bank of Detroit, 259 F.Supp. 513, 517 (E.D.Mich.1966). According to the City, under the law established by several sections in Article 3, including §§ 4-3-601(2) & (3), 4-3-603, and 4-3-802(1)(b), 2 C.R.S. (1992), the 1981 revenue bond was discharged when the District reacquired it in 1988.

1. Federal Statutory Law

The plain language of section 803(g) of the ACA authorizes the FmHA to sell notes and bonds in its possession

without eliminating the protection provided under section 1926(b) for the bond issuer. The District asserts that section 803(g) applies to all notes and bonds sold by the FmHA, including those sold back to the issuer. The City disagrees, arguing that the underlying debt required by section 1926(b) was discharged when the FmHA sold the bond back to the District, the issuer. Section 803(g) extends the protection of section 1926(b) to "all notes or other obligations sold or intended to be sold under this section." ACA, § 803(g), 101 Stat. 1714 (codified at § 1929a note (1994)) (emphasis added). We must determine whether Congress intended that "all . . . obligations sold . . . under this section" include reacquisition by an issuer of a bond held by the FmHA, where the parties intended not to discharge the bond. Because section 803(f) of the ACA provides a comprehensive scheme for selling bonds held by the FmHA back to the issuers, we conclude that Congress intended to authorize the type of transaction that occurred in the present case.

[7][8] When interpreting a federal statute, courts first look to the language of the statute. See, e.g., Rubin v. United States, 449 U.S. 424, 429-30, 101 S.Ct. 698, 701-02, 66 L.Ed.2d 633 (1981) ("When we find the terms of a statute unambiguous, judicial inquiry is complete, except in 'rare and exceptional circumstances.' ") (quoting Crooks v. Harrelson, 282 U.S. 55, 60, 51 S.Ct. 49, 50, 75 L.Ed. 156 (1930)). When our reading of the statute is consistent with the legislative history and purpose, as in the present case, no such "rare and exceptional circumstances" exist. See id. at 430, 101 S.Ct. at 701. Therefore, we are guided by the unambiguous language in section 803(g), extending the protection of section 1926(b) to "all notes or other obligations sold or intended to be sold under this section." ACA, § 803(g), 101 Stat. 1714 (codified at § 1929a note (1994)) (emphasis added). This language supports our conclusion

that the 1981 revenue bond was not discharged when the District reacquired the instrument from the FmHA in 1988.

[9] The word "all" is an unambiguous term. Hudgeons v. Tenneco Oil Co., 796 P.2d 21, 23 (Colo.App. 1990); see also O'Brien v. Village Land Co., 780 P.2d 1, 2-3 (Colo.App.1988) (stating that the word "all," used in a deed, is an unambiguous term meaning "the whole of, the whole number or sum of, or every member or individual component of"), rev'd on other grounds, 794 P.2d 246, 250 (Colo. 1990). The dictionary definition and common usage of the word "all" do not provide for an exception or exclusion that is not expressly specified. See, e.g., Cedar Rapids Community School Dist. v. City of Cedar Rapids, 252 Iowa 205, 106 N.W.2d 655, 659 (1960); see also 3 Words and Phrases 212-25 (1953 & 1994 Supp.). Black's Law Dictionary defines the word "all" as: "The whole number or sum of — used collectively, with a plural noun or pronoun expressing an aggregate. Every member of [sic] individual component of; each one of — used with a plural *92 noun." Black's Law Dictionary 74 (6th ed. 1990). Section 803(g) does not provide for any exception to the general rule that the protection provided to rural water districts under section 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold under this section" and we decline to create such an exception. See ACA, § 803(g), 101 Stat. 1714 (codified at 7 U.S.C. § 1929a note (1994)) (emphasis added). [FN19] Therefore, after considering the plain language of section 803(g), we hold that it authorized the FmHA to sell all notes or other obligations without removing the protection provided to rural water districts under section 1926(b), including selling the 1981 revenue bond back to the issuer when the parties intended that the bond remain outstanding.

FN19. In a situation analogous to the present case, the United States Court of Appeals for the Tenth Circuit

> held that a federal statute, 12 U.S.C. § 1823(c)(2)(A), preempted Colorado's version of the UCC — prohibiting the assignment of a letter of credit — because the federal "statute clearly gives FDIC/Corporation the authority to purchase 'any assets' of a failed bank." Federal Deposit Ins. Corp. v. Bank of Boulder, 911 F.2d 1466, 1472-73 (10th Cir.1990) (en banc) (emphasis added), cert. denied, 499 U.S. 904, 111 S.Ct. 1103, 113 L.Ed.2d 213 (1991). The court further held "that section 1823(c)(2)(A) creates a power in FDIC/Corporation to purchase any assets, including assets nontransferable under state law." Id. at 1473.

The fact that Congress provided for a comprehensive scheme for selling bonds held by the FmHA back to the issuers also supports our conclusion that Congress intended to allow an issuer to reacquire its bond or note without losing the protection provided under section 1926(b). See ACA, §§ 803(f) & (g), 101 Stat. 1714 (codified at 7 U.S.C. § 1929a note (1994)). We agree with the district court that:

> By including this provision [section 803(g)] in the same act which gave the rural water associations the right of first refusal to purchase their obligations from FmHA, Congress obviously intended that associations which exercise this right would still enjoy the protection of 7 U.S.C. 1926(b) so long as the obligation existed. This conclusion accords with Congress' intent in enacting section 1926(b) not only to protect FmHA loans but to promote rural water development, as noted above.

Trial Court Order of July 17, 1992, at 4.

Although the language of section 803(g) provides a sufficient basis for us to resolve this issue, our conclusion is fully consistent with the purpose of section 1926(b) and section 803(g). As the Colorado Court of Appeals recog-

nized in the present case, "the purpose of 7 U.S.C. § 1926(b) is:

> 'to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by he rural system.' "

Ute Water Conservancy Dist., 870 P.2d at 596 (quoting Jennings Water, Inc., 895 F.2d at 315 (quoting from S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S.C.C.A.N. 2243, 2309)). Section 803(g) was enacted as part of the ACA, which has been referred to as "the most comprehensive and far-reaching legislation addressing the delivery of agricultural credit in many years." H.R.Rep. No. 100-295(I), 100th Cong., 1st Sess. 53, reprinted in 1987 U.S.C.C.A.N. 2723, 2725. One of the primary purposes of enacting this comprehensive legislation was to create an improved secondary market for FmHA loans, See id. at 54, reprinted in 1987 U.S.C.C.A.N. at 2725-26. Our conclusion that Congress intended that section 803(g) apply when the bond issuer reacquires the instrument is consistent with the purpose, as well as the terms, of the ACA. Therefore, we hold that section 1926(b) applies to all notes and bonds sold by the FmHA — including those reacquired by the issuer with the intent not to discharge the instrument, as in the present case — and that the District did not discharge the 1981 revenue bond when it reacquired the instrument from the FmHA in 1988.

2. State Law

[10] State law also supports our conclusion that the 1981 revenue bond was not discharged when the District reacquired the instrument in 1988. Under common-law principles, the intent of the parties dictates *93 whether the reacquisition by the issuer of a bond that is also a negotiable

instrument discharges the debt or functions simply as a purchase and sale of the instrument.

Colorado's version of the Uniform Commercial Code (UCC) does not provide clear guidance as to how to answer the question before us of whether a bond is discharged when reacquired by the issuer. [FN20] We therefore look to state common-law principles to supplement the UCC as adopted in Colorado. § 4-1-103, 2 C.R.S. (1992) ("Unless displaced by the particular provisions of this title, the principles of law and equity . . . shall supplement its provisions.").

> FN20. Article 8 of the UCC applies to certificated securities, including the 1981 FmHA bond, which can also be negotiable instruments. See. § 4-8-105, 2 C.R.S. (1992). Article 8 provides for purchases where the purchaser acquires the same rights as those of the seller. See §§ 4-8-301, -313, 2 C.R.S. (1992). Article 8 contains no specific provision on discharge and does not prevent an issuer from reacquiring its own security. Although Article 3 of the UCC, concerning negotiable instruments, expressly states that it does not apply to investment securities, § 4-3-103(l), 2 C.R.S. (1992); see § 4-8-102(l)(d), 2 C.R.S. (1992), other authority supports the proposition that courts may look to Article 3 for "guidance" when Article 8 is silent, because a bond can also be a negotiable instrument, see, e.g., E.F. Hutton & Co. v. Manufacturers Nat'l Bank of Detroit, 259 F.Supp. 513, 517 (E.D.Mich.1966); see also 12 Am.Jur.2d Bonds § 51 (1964 & 1995 Supp.); 11 C.J.S. Bonds § 63 (1938 & 1994 Supp.). Section 4-3-601 governs the discharge of debt under Article 3, but does not provide clear guidance as to how to answer the question before us.

Case law supports our conclusion that the intent of the parties dictates whether the repurchase of a bond, which is also a negotiable instrument, by the issuer discharges the

underlying debt or merely functions as an acquisition of the instrument. [FN21] See, e.g., Fidelity & Columbia Trust Co. v. Louisville Railway Co., 258 Ky. 817, 81 S.W.2d 896, 899 (1935) (citing numerous cases and secondary authorities to support its conclusion that: "The rule recognized without exception by American courts is that a corporation may purchase its own bonds and reissue them where there is a manifest intention to keep them alive."); see also 2 Leonard A. Jones, The Law of Bonds and Bond Securities § 608, at 11-12 (4th ed. 1935) (stating that private corporations can reacquire bonds that they have issued and subsequently reissue those bonds "[i]f the facts show that, in reacquiring the bonds there was no intention that they should thereby be paid. . . ."); 11 C.J.S. Bonds § 61 (1938 & 1994 Supp.) ("Delivery of a bond, with the intention and direction that it be canceled, to the obligor, or a third person, extinguishes the bond.") (footnotes omitted); see generally Columbia Savings v. Zelinger, 794 P.2d 231, 234-36 (Colo.1990) (stating that the intent of the parties determines whether a debt was discharged under Article 3 of the UCC). In the present case, the intent of the parties involved in the 1988 transaction (i.e., the FmHA and the District) was to keep the 1981 revenue bond active and not discharge the debt after the District repurchased the instrument from the FmHA. Although the FmHA had no further rights or obligations under the 1981 revenue bond, neither the FmHA nor the District intended to discharge or cancel the bond. This conclusion is supported by expert testimony, trial exhibits, and the findings of the trial court.

> FN21. The City also argues that under common-law principles, the bond was discharged, citing Fitch v. Hammer, 17 Colo. 591, 31 P. 336 (1892). That case and other cases cited by the City, however, support the proposition that payment by one of several joint debtors upon a negotiable instrument discharges the debt as to

all of the joint debtors, which is not the situation in the present case.

First, the District's bond counsel, Richard E. Mitchell, who structured the 1988 transaction, in which the District repurchased the 1981 revenue bond from the FmHA, testified as an expert witness at trial that the transaction was structured to effectuate the District's intent to reacquire the bond without discharging the underlying debt in order to enable the District to resell the bond in the future. The City provided no expert testimony to the contrary.

Second, a letter dated June 28, 1988, from the FmHA and the District to the escrow agent directed the escrow agent to make payments of principal and interest on the 1981 bond, as they came due, to the District *94 after the District repurchased the bond. This letter demonstrates that the District intended that the bond remain outstanding, even though the District was at that time both the holder of the bond and the debtor.

[11] Third, the instrument itself demonstrates that the FmHA transferred the 1981 revenue bond to the District, but did not intend to cancel it. By endorsing the back of the instrument, the FmHA transferred the bond to the District rather than marking the bond "paid in full," which would have canceled or discharged the debt. Mitchell contrasted other transactions involving the reacquisition of a bond held by the FmHA in which the issuer paid the FmHA and received its bonds marked "paid in full" on the face of the instruments. The manner in which the FmHA executed and transferred the instrument provides concrete evidence to support our conclusion that the FmHA, as well as the District, intended that the 1981 revenue bond remain outstanding after the District reacquired the instrument in 1988. [FN22]

FN22. The City further contends that Congress left the FmHA with no discretion to leave a debt or obligation outstanding upon selling the 1981 revenue bond back to the issuer. The City cites 7 U.S.C. § 1929a(e) (1994), which states that "[t]he Secretary and any subsequent purchaser of such notes and other obligations sold by the Secretary on a nonrecourse basis shall be relieved of any responsibilities that might have been imposed had the borrower remained indebted to the Secretary." We do not find the City's argument persuasive. Rather, we agree with the District that § 1929a(e) relieves the purchaser of a note or bond held by the FmHA from any special obligation that the FmHA had to the borrower, but this statute does not relieve the borrower from the obligation to repay the debt.

[12] Fourth, the trial court determined that the parties intended that the debt not be discharged and stated that the evidence to this effect was "undisputed." Determining the intent of the parties involves a factual finding that should not be disturbed on appeal unless clearly erroneous. See Zelinger, 794 P.2d at 235. Specifically, the district court concluded that "the District's mere acquisition of its bond [did not] extinguish the obligation." In determining that the bond is still outstanding, the trial court expressly found the expert testimony of the District's bond counsel, Mitchell, to be more persuasive than evidence relied upon by the City. [FN23] Therefore, state law principles, the evidence in the present case, and the district court's findings all support our conclusion that the District repurchased the bond without discharging the underlying debt.

FN23. The City had argued that footnotes to the District's financial statements provided evidence that the District redeemed, or paid off, the 1981 revenue bond because the notes contained the word "re-

> deemed." The context of the footnotes as a whole, however, does not suggest that the bond was discharged. Rather, the footnotes state that: Upon redemption of the Water Revenue Bonds, Series 1981, the District received the right to all future payments from the trust [paid by the escrow agent]. Payments from the trust are due on January 1, and July 1 of each year through July 1, 2021 [the maturity date of the 1981 revenue bond].

B.

[13] The City alternatively contends that the 1981 revenue bond was discharged when the District advance refunded the bond in 1983. The applicable federal statutes, as well as state common-law principles, however, do not support the City's contention.

As noted above, the purpose of 7 U.S.C. § 1926(b) is to protect rural water districts, as well as loans made to those districts. E.g., City of Madison, 816 F.2d at 1060. Moreover, Congress intended that section 1926(b) be read broadly. Jennings Water, Inc., 895 F.2d at 315. In altering the source of repayment for the 1981 revenue bond, the District did not discharge its underlying obligation to repay the FmHA. Allowing the District financial flexibility while at the same time protecting the FmHA's loan is fully consistent with the well-established purposes of section 1926(b).

The evidence presented to the trial court in the present case further supports our conclusion that the advance refunding transaction did not discharge the 1981 revenue bond. We agree with the court of appeals that:

> Here, although the original lien on the district revenues brought about by the 1981 bond issue was discharged, those revenues were at the same time encumbered *95 by the refunding issue of 1983. The district's indebtedness

> thus remains, even though the source of repayments for the 1981 bonds has shifted to the escrowed funds. Furthermore, should the escrowed funds be insufficient, the shortfall would be made up from district revenues, which are also the basis of payment for the 1983 bonds.

Ute Water Conservancy Dist., 870 P.2d at 597. Mitchell, the District's bond counsel, testified that the District remained liable to pay the debt if the newly created escrow account was ever insufficient. Therefore, Mitchell's expert testimony, which was not controverted by any expert testimony for the City, supports the conclusion that the 1983 advance refunding transaction did not discharge the District's obligation to make payments to the FmHA on the 1981 revenue bond. See id. (citing 2416 Corp. v. Board of Trustees, 209 Ill.App.3d 504, 154 Ill.Dec. 276, 282-83, 568 N.E.2d 276, 282-83 (1991) (stating that the trial court can rely on "an expert's opinion on the meaning to be ascribed to terms of art in a specialized area of the law")).

[14][15] State law principles governing advance refunding transactions also support our conclusion that the 1981 revenue bond was not discharged as a result of the 1983 transaction. "As refunding bonds are issued to refinance an outstanding issue, they do not create a new obligation but are considered to be an extension of the obligation of the original bonds." 2416 Corp., 154 Ill.Dec. at 278, 568 N.E.2d at 278; see also 1 Jones §§ 393-94, at 423-25. An advance refunding does not eliminate a bondholder's fundamental right to payment on the bond. See Morton Arboretum v. Thompson, 605 F.Supp. 486, 490-92 (N.D.111.1984); Hammerman v. Illinois State Toll Highway Auth., 148 Ill.App.3d 259, 101 Ill.Dec. 471, 474-75, 498 N.E.2d 795, 798-99 (1986). Therefore, we hold that the 1983 advance refunding transaction did not discharge the District's obligation to make payments on the 1981 revenue bond to the FmHA. [FN24]

FN24. The City also argues that the federal courts have interpreted § 1926(b) as requiring "continuing indebtedness." See, e.g., Glenpool Utility Services Auth. v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1214 (10th Cir.1988), cert. denied, 490 U.S. 1067, 109 S.Ct. 2068, 104 L.Ed.2d 633 (1989). The City suggests that § 1926(b) requires an outstanding debt to the federal government. We reject this position because § 1926(b) requires only that the bond be outstanding, it does not require that the District be indebted to the federal government. The unambiguous language of the OBRA, and its subsequent amendments under the ACA, make it clear that the protection provided for rural water districts under § 1926(b) remains even when the FmHA sells a note or bond in its possession to an entity other than the federal government. ACA, § 803(g), 101 Stat. 1714 (codified at 7 U.S.C. § 1929a note (1994)). In fact, Congress enacted the OBRA, and subsequent amendments under the ACA, in order to ensure that the protection provided for in § 1926(b) would remain intact even after the FmHA sold the note or other obligation to a third party or the issuer. The City's argument, in effect, would have us ignore both the clear language and the purpose of the federal statutes. Although we agree with the City that the District is no longer obligated to the FmHA under the 1981 revenue bond, we do not agree with the City that the bond is no longer outstanding. Moreover, we agree with the City to the extent that the "continuing debt" requirement simply paraphrases the statutory requirement that the bond be outstanding in order to qualify for the protection provided under § 1926(b). As noted throughout this opinion, however, we conclude that the 1981 revenue bond remains outstanding and thus § 1926(b) protects the District from

competition in the overlap areas until the bond is discharged or reaches maturity.

IV.

[161 Lastly, the City argues that under the facts of the present case, 7 U.S.C. § 1926(b) violates the Tenth Amendment to the United States Constitution. [FN25] The Tenth Amendment to the United States Constitution provides: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X. Specifically, the City argues that the power of Congress to enact section 1926(b) rests upon the spending clause of the United States Constitution, see *96 U.S. Const. art. I, § 8, cl. 1, which is subject to various limitations. [FN26] Application of section 1926(b) would exceed several of these limitations, the City argues, if it is applied after the District has paid off and purchased the bond from the FmHA. The City bases its argument on the premise that because the FmHA is no longer the bond holder, there is no federal interest involved.

FN25. The District asserts that the City failed to raise its Tenth Amendment challenge in a timely manner and thus has waived this argument. For the limited purpose of disposing of this particular issue, we assume that the City raised its Tenth Amendment challenge in a timely manner.

FN26. Article I, § 8, cl. 1, of the United States Constitution provides: "The congress shall have power . . . [t]o lay and collect taxes, duties, imposts and excises; to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

Contrary to the City's assertion, however, we conclude that the federal interest of encouraging rural water districts to provide their services to rural residents throughout the United States exists even after the FmHA has sold a bond issued by such a district. The legislative history of section 1926(b) supports our conclusion that Congress intended that section 1926(b) protect rural water districts, as well as the federal loans made to them. The City's argument would have us ignore one of the two clear purposes of enacting section 1926(b) and focus exclusively on protecting federal loans, which we cannot do. Thus, we conclude that the federal interest of encouraging rural water districts to provide water services to rural residents throughout the country, and the protection afforded to those rural water districts under section 1926(b), exists even when the water district is no longer indebted to the federal government.

Furthermore, section 1926(b) does not violate the Tenth Amendment when "[t]he limits on the provision of water service are thus restricted in time and in scope so as not to disable the city severely from performing its governmental function." City of Madison, 816 F.2d at 1061. In City of Madison, the Fifth Circuit Court of Appeals recognized that section 1926(b) limits a city's provision of water service but "does not, however, permanently curtail the city's authority [to provide water service], because it applies only while the federal debt is outstanding." Id. Accordingly, the court upheld the constitutionality of section 1926(b) against a Tenth Amendment challenge. Id.; see also Glenpool, 861 F.2d at 1216.

Applying the analysis of City of Madison to the present case, we conclude, as did the court of appeals, that section 1926(b) does not violate the Tenth Amendment to the United States Constitution because the monopoly granted to the District is limited in time and geographic scope. Ute Water Conservancy Dist., 870 P.2d at 598 (citing City of

Madison, 816 F.2d 1057). First, the duration of the protection provided to the District under section 1926(b) is limited by the outstanding debt requirement, i.e., until the bond is discharged or reaches its maturity in 2021. Thus, the City is prevented from providing water services only during the period of time that the 1981 revenue bond remains outstanding. As in City of Madison, "[a]t most, [s]ection 1926(b) ordains a dual water authority function within a municipal area for a period of time." City of Madison, 816 F.2d at 1061. Second, the geographic scope of the protection provided to the District under section 1926(b) is limited to the overlap areas. The City is free to provide water service within its territorial boundaries, where the City's territory does not overlap the District's territory. Therefore, these temporal and geographic limitations establish that section 1926(b) is consistent with the Tenth Amendment. We hold that section 1926(b), as applied in the present case, does not violate the Tenth Amendment to the United States Constitution.

V.

On cross-petition, the District conditionally raises two issues for us to review regarding whether the District is a "municipality" with the exclusive right to provide water service in the overlap areas under Colorado law. See issues 4 and 5, supra n. 1. Because we hold that the 1981 revenue bond is outstanding, thereby preventing the City from providing water service in the overlap areas, we need not address the issues raised by the District on cross-petition. We therefore affirm the court of appeals' decision to vacate the district court's summary judgment ruling that the City is a "municipality" under section *97 31-35-402(1)(b), 12B C.R.S. (1986), while the District is not a "municipality" under that statute. Ute Water Conservancy Dist., 870 P.2d at 598-99.

VI.

In sum, we hold that the District is entitled to the protection provided under 7 U.S.C. § 1926(b) — which prohibits the City from providing domestic water service in the overlap areas, except to those existing customers that it has historically served — until the 1981 revenue bond is discharged or reaches its maturity in 2021. We conclude that the applicable federal statutes preempt state law. We further conclude that the unambiguous language and purpose of the federal statutes, state common-law principles, and the district court's findings of fact support our conclusion that the District did not discharge the 1981 revenue bond when it reacquired the instrument in 1988; nor did the District discharge the bond when it conducted an advance refunding transaction in 1983. Because we resolve the present case in favor of the District, we need not, and do not, address the conditional issues raised by the District in its cross-petition. Accordingly, we affirm the judgment of the court of appeals.

COLORADO COURT OF APPEALS
No. 92CA2026
October 21, 1993

UTA WATER CONSERVANCY DISTRICT,
Plaintiff-Appellee and Cross-Appellant,
v.
CITY OF GRAND JUNCTION,
Defendant-Appellant and Cross-Appellee.

Appeal from the District Court of Mesa County
Honorable David A. Bottger, Judge
Honorable Nicholas R. Massaro, Judge
No. 91CV26H

Division II
Opinion by JUDGE NEY
Tursi and Taubman, JJ., concur

JUDGMENT AFFIRMED IN PART,
VACATED IN PART, AND
APPEAL DISMISSED IN PART

Opinion Modified, and As Modified,
Petition for Rehearing DENIED

Williams, Turner & Holmes, P.C., Mark A. Hermundstad,
William D. Prakken, Grand Junction, Colorado, for
Plaintiff-Appellee and Cross-Appellant

Daniel E. Wilson, City Attorney, John P. Shaver,
Assistant City Attorney, Grand Junction, Colorado;
Grimshaw & Harring, P.C., Wayne B. Schroeder,
Ronald L. Fano, Peter J. Whitmore, Denver, Colorado,
for Defendant-Appellant and Cross-Appellee

Defendant, City of Grand Junction (city), appeals the judgment of the trial court entered in favor of plaintiff, Ute Water Conservancy District (district). Plaintiff cross-appeals that judgment. We affirm in part, vacate in part, and dismiss the appeal in part.

The district was formed in 1956 to supply water to certain unincorporated areas of Mesa County. At that time, the city was surrounded by the district, but there was no overlap of the city's and the district's boundaries.

This lack of overlap ended when the city annexed territory within the boundaries of the district. These annexations resulted in controversy over which entity, the city or the district, would provide water service in areas which lay within the boundaries of both.

For a number of years, this controversy was resolved by written agreements between the city and the district. However, at trial, the city sought to terminate the current contract, and the court ordered that it could do so provided reasonable notice was given. That portion of the trial court's order has not been appealed.

As a further matter, the city and the district each sought the exclusive right to provide water service to the overlap areas. The trial court determined that under federal statutes the district had that right. It is this determination that the city appeals.

The district cross-appeals the trial court's determination that it is not a municipality governed by the provisions of § 31-35-402(1), C.R.S. (1986 Repl. Vol. 125), and, thus, would require the consent of the city to provide service at some future time.

I.

The city contends that the trial court erred in its conclusion that the district has the exclusive right to provide water service in the overlap areas for a certain length of time. We do not agree.

During its existence, several financial transactions were made by the district to establish and improve its water system. Pertinent to the action before us are bond transactions which occurred in 1981, 1983, and 1988.

In 1981, the district issued revenue bonds which were bought by the federal Farmers Home Administration (FmHA). As security for the bond issue, the district pledged its revenues.

In 1983, in a transaction known as "advance refunding," the district refinanced the 1981 bonds by issuing a new series of bonds. The proceeds from the 1983 refunding bonds were placed into an escrow account and from there were used to pay the principal and interest on the 1981 bonds as such amounts came due. The escrowed bond proceeds replaced the district revenues as security for the 1981 bonds, and those revenues became the security for the 1983 refunding bond issue.

In 1988, pursuant to the Omnibus Budget Reconciliation Act of 1986, 7 U.S.C. 1929a note (1988), (OBRA) and the Continuing Appropriations Act of 1987, the district purchased its 1981 bond issue from FmHA. In so doing, the district's indebtedness to FmHA was cancelled, and the paying agent for the escrowed funds was directed by FmHA to make all future payments on the 1981 bond directly to the district.

At issue here is the effect of Section 306(b) of the Consolidated Farm and Rural Development Act, 7 U.S.C.

§ 1926(b) (1988), on those transactions. That section states:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar services within such area *during the term of such loan*; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event. (emphasis added)

Under the statute an "association" is defined as an "entity which has received a loan from the Secretary (FmHA)" *Pinehurst Enterprises, Inc. v. Town of Southern Pines*, 690 F. Supp. 444, 452 (M.D.N.C. 1988). The city does not dispute that the district is such an entity. However, it is the position of the city that the district has by its financial transactions removed itself from the protection afforded by 7 U.S.C. § 1926(b).

A.

First, the city maintains that the district, in advance refunding its 1981 bond issue, redeemed the bond and thus removed itself as debtor when the escrowed funds became the source and security for repayment. In support of this argument, it cites *Glenpool Utility Services Authority v. Creek County Rural Water District No. 2*, 861 F.2d 1211, (10th Cir. 1988), *cert. denied*, 490 U.S. 1067, 109 S.Ct 2068, 104 L.Ed.2d 632 (1989) (to meet the threshold requirements of 7 U.S.C. § 1926(b), there must be a continuing indebtedness under Section 1926); *Water Works District No. II v. City of Hammond*, No. CIV.A.86-0187, 1989

Westlaw 117849, (E.D. La. 1989) (Section 1926(b) applies only while the water association is indebted to FmHA).

The district, on the other hand, argues that the bond was not redeemed but merely "defeased" and, therefore, that the term of the note continues and is still outstanding. It finds support for this position in *City of Virginia v. Northland Office Properties Limited Partnership*, 465 N.W.2d 424 (Minn. App. 1991) (a bond which has been advance refunded is still outstanding) and in the uncontradicted testimony of its expert in municipal finances that the defeasance did not discharge the underlying obligation. We agree with the district.

According to its legislative history, the purpose of 7 U.S.C. § 1926(b) is:

> to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural system.

Jennings Water, Inc. v. City of North Vernon, 895 F.2d 311, 315 (7th Cir. 1989). Furthermore, it was the intent of Congress "to encourage rural water development" and "to safeguard the viability and financial security of such associations (and FmHA's loans)." *City of Madison v. Bear Creek Water Ass'n, Inc.*, 816 F.2d 1057, 1060 (5th Cir. 1987).

The intent of Congress, therefore, was not limited to protection of FmHA but extended to protect the entity which had incurred debt to develop rural water service. This interpretation is in accord with the conclusion of *Jennings Water, Inc. v. City of North Vernon*, 682 F. Supp. 421 (S.D. Ind. 1988), *aff'd*, 895 F.2d 311 (7th Cir. 1989), that Congress intended 7 U.S.C. § 1926(b) to be read broadly.

Here, although the original lien on the district revenues brought about by the 1981 bond issue was discharged, those revenues were at the same time encumbered by the refunding issue of 1983. The district's indebtedness thus remains, even though the source of repayments for the 1981 bonds has shifted to the escrowed funds. Furthermore, should the escrowed funds be insufficient, the shortfall would be made up from district revenues, which are also the basis of payment for the 1983 bonds.

Our supreme court, in *Columbia Savings v. Zelincer*, 794 P.2d 231 (Colo. 1990), held that a cancellation or renunciation of an instrument made unintentionally or by mistake has no effect. An intent to discharge a party must be present, and the determination of the intent of the parties involves a question of fact.

Under the circumstances here, we cannot conclude that the 1983 bond issue satisfied the district's debt to FmHA. The district structured its transactions with the intent to preserve the indebtedness to FmHA, and its expert so testified in detail and without contradiction. Hence, we agree with the trial court's conclusion that the 1983 transaction did not serve to relieve the district of its underlying debt to FmHA and did not remove it from the protection afforded by 7 U.S.C. § 1926(b). *See 2415 Corp. v. Board of Trustees*, 209 Ill. App. 3d 504, 568, N.E.2d 276 (1991) (trial court should not ignore municipal bond expert's opinion as to meaning to be ascribed to terms of art in a specialized area of the law).

B.

The city alternatively argues that the district's indebtedness to FmHA was satisfied when it purchased its 1981 bond from FmHA in 1988 and, consequently, that the district is not entitled to protection under 7 U.S.C. § 1926(b). We are not persuaded.

OBRA and the Continuing Appropriations Act of 1987 required that FmHA sell certain assets. The Agricultural Credit Act of 1987, 7 U.S.C. 1929a at 846 (1988), amended OBRA to require that the Secretary of Agriculture first offer for sale to the issuer any notes or other obligations held under the Consolidated Farm and Rural Development Act.

The district took advantage of this opportunity to purchase its 1981 bond at a substantial discount, and the bond was assigned to the district. At that point, FmHA ceased to own the bond, and the administrator of the escrowed funds was directed by FMEA to make payments of principal and interest to the as such amounts came due.

While it is true that upon the assignment of the bonds to it the district was no longer indebted to the federal government, we conclude, for the reasons stated above, that the underlying debt did not cease to exist and that 7 U.S.C. § 1926(b) still applied to safeguard the viability and financial security of the district. *See City of Madison v. Bear Creek Water Ass'n, Inc., supra.*

Moreover, the circumstances presented here is specifically addressed by OBRA, 7 U.S.C. 1929a at 846 (1988):

> (g) Applicability of Prohibition on Curtailment or Limitation of Service. Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b)) *shall be applicable to all notes or other obligations sold or intended to be sold under this section.* (emphasis added)

The city maintains that when Congress directed that the protection of 7 U.S.C. § 1926(b) should be applicable to all obligations thus sold, it intended to safeguard a third party's entitlement to payment and not to extend protection to debtors who had purchased their own notes at a discount. However, the city cites no authority in support of this

argument, and we prefer to rely upon the plain language of the status which references *all* notes and obligations.

Additionally, we conclude that this provision, when read in conjunction with the provision that such notes or obligations be offered first to the issuer, clearly indicates the intent of Congress that the protection of 7 U.S.C. § 1926(b) apply as long as the underlying obligation evidenced by the note exists.

Accordingly, we agree with the trial court's conclusion that 7 U.S.C. § 1926(b) prohibits the city from providing water service to the overlap areas so long as the district's 1981 water revenue bond remains outstanding.

C.

The city, relying upon 7 U.S.C. § 1929a(e)(1988), argues that the district's liability has been discharged. Again, we are not persuaded.

The pertinent language provides:

> The Secretary and any subsequent purchaser of such notes or other obligations sold by the secretary on a nonrecourse basis shall be relieved of any responsibilities that might have been imposed had the borrower remained indebted to the Secretary.

While the statute relieves the obligations of the Secretary and the subsequent purchaser, it does not so absolve the borrower. Here, the district is both purchaser and borrower. And, because we conclude that it is the district's position as borrower that is at issue here, the statute is inapposite.

D.

The city contends that the trial court erred by its refusal to address as untimely the city's argument, raised in a post-trial motion, that the application of 7 U.S.C. § 1926(b) is in

violation of the Tenth Amendment which reserves powers not delegated to the United States, or prohibited by the Constitution, to the States or the people. Assuming, arguendo, that the argument was timely raised, we conclude that the statute's conflict with the Tenth Amendment previously has been addressed in *City of Madison v. Bear Creek Water Ass'n, Inc., supra.*

There, the court concluded that because the application of § 1926(b) was restricted in time and scope so as not to disable the city severely from performing its function, it did not violate the Tenth Amendment. The city maintains that the *Madison* analysis is premised upon the existence of an outstanding federal debt and, thus, is not applicable here. We do not agree.

The *Madison* court determined that § 1926(b) did not permanently curtail the city's authority because it applies only while the federal debt is outstanding. Nevertheless, our interpretation of the court's ruling is that it turns upon the scope of the curtailment of authority rather than upon the existence of federal indebtedness. Consequently, under the facts here, in which the city is limited only in its provision of water services to a defined area and that limitation is of a temporary nature, we conclude that there is no offense to the Tenth Amendment.

E.

Because we have determined that the trial court correctly based its decision upon the applicable federal statutes, we do not address the contentions of the city which rest upon provisions of the Uniform Commercial Code as adopted by our General Assembly.

II.

The district, on cross-appeal, contends that the trial court erred in its conclusion that the district is not a municipality for the purposes of § 31-35-402(1) and, consequently, that the city has exclusive rights to provide water service to the overlap areas when the district's 1981 debt is repaid.

Because almost three decades may elapse before the protection afforded by 7 U.S.C. § 1926(b) is lost to the district, we conclude that the decision of the trial court to address this issue was premature.

Furthermore, the issue of who has the right to provide water service to the overlap areas when the district's 1981 debt is repaid presents no justiciable controversy at this time. Therefore, we vacate that portion of the trial court's judgment.

III.

Finally, the city contends that the trial court erred in its general award of costs to the district. Here, no specific award of costs were made, and the trial court retained jurisdiction pending the outcome of a relevant case currently before the supreme court, *Board of County Commissioners v. Crystal Creek Homeowners Ass'n* (Colo. No. 925A312, pending as of Oct. 1, 1993). Thus, the city's appeal of this issue is untimely, and we dismiss it without prejudice.

The judgment is affirmed in part, vacated in part, and the appeal is dismissed as to the award of costs.

JUDGE TURSI and JUDGE TAUBMAN concur.

OPINION is modified as follows:

Beginning on page 5, 26 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by redlining) are made:

1983 bond issue satisfied the district's debt to FmHA. The district~~, at all times,~~ structured ~~the~~ its transactions with the

And, on page 9, 10 lines from the top of the page, the following deletions (shown by overstriking) and additions (shown by redlining) are made:

The *Madison* court determined that § 1926(b) "did not permanently curtail the city's authority because it applies only while the federal debt is outstanding." Nevertheless, our interpretation

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Joint Appendix Vol. I through V were sent via U.S. Mail to the parties listed below on the 23rd. day of February, 1996.

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Honorable Sandra S. Beckwith
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Southern District, Western Division
Potter Stewart United States District Courthouse
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/s/ LOUIS T. ROSENBERG

Louis T. Rosenberg
John W. Hust

CITY OF MADISON, MISSISSIPPI,
Plaintiff-Appellant,

v.

BEAR CREEK WATER ASSOCIATION, INC.,
Defendant-Appellees,

United States of America,
through its agency,
Farmers Home Administration,
Intervenor-Appellee.

No. 86-4552.

United States Court of Appeals,
Fifth Circuit.

May 15, 1987.

City instituted eminent domain proceedings to condemn facilities of water association indebted to Farmers Home Administration. Administration intervened, and action was removed. The United States District Court for the Southern District of Mississippi, Henry T. Wingate, J., entered summary judgment in favor of water association and Administration, and city appealed. The Court of Appeals, Edith H. Jones, Circuit Judge, held that: (1) city was precluded from condemning water association's facilities located within city limits and certificate of public convenience and necessity during term of water association's indebtedness to Administration, and (2) section of Consolidated Farm and Rural Development Act, proscribing cities from curtailing or limiting services provided by water association indebted to Administration, did not violate the Tenth Amendment.

Affirmed.

1. Federal Courts — 766

Summary judgments are reviewed by Court of Appeals in same manner as federal district court, i.e., in terms of whether there is any genuine issue of material fact, and whether appellee was entitled to judgment as a matter of law.

2. States — 18.69

City was precluded from condemning water association's facilities located within city limits and association's certificate of public convenience and necessity during term of association's indebtedness to Farmers Home Administration. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b).

3. Waters and Water Courses — 202

Under Consolidated Farm and Rural Development Act, local government may not encroach upon services provided by water association indebted to Farmers Home Administration, be that encroachment in form of competing franchises, new or additional permit requirements, or similar means, such as condemnation of association's facilities or certificate of public convenience and necessity. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b).

4. Statutes — 217.4

Legislative history need not be examined where statutory language is unambiguous and yields no absurd results.

5. Waters and Water Courses — 202

Section of Consolidated Farm and Rural Development Act, prohibiting cities from curtailing services of water associations indebted to Farmers Home Administration by granting competing franchises or annexing areas served by

association, serves two congressional purposes: to encourage rural water development by expanding number of potential users of such systems, thereby decreasing per-user cost, and to safeguard viability and financial security of such associations and loans by Farmers Home Administration to such associations by protecting those associations from expansion of nearby cities and towns. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b).

6. States — 4.17

Section of Consolidated Farm and Rural Development Act, proscribing cities from curtailing or limiting services provided by water association indebted to Farmers Home Administration by granting competing franchises or by annexing areas served by association, did not violate Tenth Amendment; statute curtailed city's authority in regard to provision of water service only while association was indebted to Administration and was enacted to protect Administration's subsidy of rural water authorities. Consolidated Farm and Rural Development Act, § 306(b), 7 U.S.C.A. § 1926(b); U.S.C.A. Const.Amend. 10.

7. States — 4.16

Tenth Amendment is not offended by limited restriction imposed by federal government to protect its subsidized loans, particularly when benefits of those loans accrue to municipality. U.S.C.A Const. Amend. 10.

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Louis T. Rosenberg, San Antonio, Tex., for amicus curiae Green Valley Water Supply Corp. and Texas Rural Water Supply Assoc.

Appeal from the United States District Court For the Southern District of Mississippi.

Before THORNBERRY, GEE, and JONES, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The City of Madison, Mississippi ("Madison"), appeals from the district court's grant of summary judgment in favor of Bear Creek Water Association, Inc. ("Bear Creek"), and the Farmers Home Administration ("FmHA"). Because we agree with the district court that 7 U.S.C. § 1926(b) precludes municipal condemnation of a water association's facilities during the term of its indebtedness to the FmHA, we affirm.

I. BACKGROUND

In the early 1970's, Bear Creek, a non-profit corporation, was organized to seek a certificate of public convenience and necessity from the Mississippi Public Utility Commission to operate a rural water utility. As the proposed certificated area was within one mile of the city limits of Madison, the city's acquiescence was necessary before the certificate could be issued. In 1971, the city agreed to relinquish its rights in the area, and Bear Creek received the certificate of public convenience. Since this time, Bear Creek has in-

stalled and operated the water system in the certificated area, financed by five loans from FmHA.[1]

However, during this time the City of Madison has grown substantially, and its boundaries now include a part of the area served by Bear Creek. In 1985, the city instituted eminent domain proceedings to condemn Bear Creek's facilities located within city limits as well as Bear Creek's certificate to operate in that area. This area includes approximately 40% of Bear Creek's customers, and 60% of Bear Creek's water supply facilities, including its water plant, wells, and feeder mains. FmHA subsequently intervened and the case was removed to federal court pursuant to 28 U.S.C. §§ 1444 and 2410.

In July 1986, the district court granted Bear Creek's motion for summary judgment on the ground that because Bear Creek was indebted to FmHA, 7 U.S.C. § 1926(b) applied and precluded the city's condemnation action. The city now appeals.

II. DISCUSSION

[1] We review summary judgments in the same manner as the district court, in terms of whether there is any genuine issue of material fact and whether appellee was entitled to judgment as a matter of law. *McCrea v. Hankins*, 720 F.2d 863 (5th Cir.1983).

A. 7 U.S.C. § 1926(b)

Regarding water associations indebted to FmHA, 7 U.S.C. § 1926(b) provides:

---

[1] Bear Creek's current indebtedness to FmHA is approximately $1.4 million, and Bear Creek has recently qualified for an additional $1 million in FmHA loans for system expansion and improvements.

> The service provided or made available through any such association shall not be curtailed or limited by the inclusion of the area within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of said loan; nor shall the happening of such event be the basis of requiring such association to secure any franchise, license or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

The district court held that this provision prohibits cities such as Madison from curtailing the services of funded water associations, be it through annexation, franchise, or condemnation. Madison argues that because the statute does not expressly prohibit condemnation, § 1926(b) only protects such associations from competition from municipalities, and thus does not preclude such entities from exercising their right of eminent domain.

[2, 3] We disagree. The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us do, and allow a city to do via condemnation what is forbidden by other means, would render nugatory the clear purpose of § 1926(b). See *Moore Bayou Water Association, Inc. v. Town of Jonestown*, 628 F.Supp. 1367 (N.D.Miss. 1986) (holding municipal condemnation of water association's facilities and certificate violative of § 1926(b)).

Madison contends that this construction of the statute is untenable because it leads to the "plainly absurd" result that

FmHA-financed water authority could avoid condemnation even if it owed only $1.00 on its government loan. However, it was Congress, and not this Court, that literally proscribed interference by competing facilities with the rural water authority "during the term of said loan." The city's logic also assumes § 1926(b) must somehow be construed to effectuate the local condemnation power. Pursuing such logic, we might decide that so long as the condemnation does not "unduly interfere" with the water authority's payment obligations to FmHA, or with its ability to service rural water users, the condemnation may proceed. Such a result, however, would have a perverse impact upon both the rural water authority and the would-be condemnor. In each case, the contending parties could raise and seek adjudication of the fact issue concerning the extent of interference that would result from condemnation. A condemnation case impinging on a rural water authority could easily involve both state and federal court litigation, high legal fees and considerable delay, to the ultimate detriment of the municipality, the rural water authority, and the consumers of water service. A bright-line rule which prohibits condemnation throughout the FmHA loan term at least creates certainty for the municipal planner and the rural water authority, even if it limits the municipality's options.

[4, 5] Madison, however, argues that our interpretation of § 1926(b) is contrary to the legislative history of that provision. While we need not resort to legislative history where, as here, the statutory language is unambiguous and yields no absurd results, see *Steere Tank Lines, Inc. v. I.C.C.*, 724 F.2d 472, 477 (5th Cir.1984), we note that our interpretation of § 1926(b) comports with the purposes found in its legislative history:

> By interpretation, loans cannot now be made unless a major part of the use of the facility is to be by farmers. This section would broaden the utility of this authority

> somewhat by authorizing loans to associations serving farmers, ranchers, farm tenants, and other rural residents. This provision authorizes the very effective program of financing the installation and development of domestic water supplies and pipelines serving farmers and others in rural communities. By including service to other rural residents, the cost per user is decreased and the loans are more secure in addition to the community benefits of a safe and adequate supply of running household water. A new provision has been added to assist in protecting the territory served by such an association against competitive facilities, which might otherwise be developed with the expansion of municipal and other public bodies into an area served by the rural system.

S.Rep. No. 566, 87th Cong., 1st Sess., *reprinted in* 1961 U.S.Code Cong. & Admin. News 2243, 2809. This history indicates two congressional purposes behind § 1926: 1) to encourage rural water development by expanding the number of potential users of such systems, thereby decreasing the per-user cost, and 2) to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from the expansion of nearby cities and towns.

The case at bar exemplifies the evil Congress wished to avoid. Bear Creek's affidavits showed that Madison desires to condemn 60% of its facilities and 40% of its customers, including the most densely populated (and thus most profitable) territory now served by Bear Creek. Even if fair value is paid for the lost facilities, such an action would inevitably have an adverse effect on the remaining customers of Bear Creek, in the form of lost economies of scale and resulting higher per-user costs. To allow expanding municipalities to "skim the cream" by annexing and condemning those parts of a water association with the highest population density (and thus the lowest per-user cost) would undermine Con-

gress's purpose of facilitating inexpensive water supplies for farmers and other rural residents and protecting those associations' ability to repay their FmHA debts. See *Public Utility District No. 1 of Franklin County v. Big Bend Electrical Cooperative, Inc.*, 618 F.2d 601 (9th Cir.1980) (similarly rejecting utility's attempt to condemn property owned by cooperative financed by the Rural Electrical Administration).

Our interpretation of § 1926(b) is also inferentially supported by FmHA regulations regarding the transfer of water facilities subject to FmHA liens. These regulations require that any transfer must be approved by FmHA to insure that services will not be curtailed and that repayment of the FmHA loans is not jeopardized. 7 C.F.R. 1951.209, 1951.214 (1986).[2] The regulations also suggest an alternate means by which the city might acquire the facilities it desires, in the context of a consensual sale.

B. Tenth Amendment

[6] the city urges that if § 1926(b) limits the city's sovereign condemnation power, it violates the Tenth Amendment to the Constitution. We are not unsympathetic to enforcing the legitimate Tenth Amendment-based claims of state authorities against federal government infringement. Our natural ardor to preserve that critical division of power between the federal and state governments, a bulwark of protecting our individual liberties, is necessarily dampened, however, by the supreme Court's decision in *Garcia v. San*

[2]Appellants' reliance on the unreported case of *View-Caps Water Supply Corp. v. City of Abilene*, No. CA-1-83-119-W (N.D.Tex.1985) is misplaced. In that case, where the district court allowed the City of Abilene to serve customers in an area originally certified to the water association, FmHA had apparently approved a contract between the parties which provided for the city's acquisition of the water facilities in the event of annexation. In the case at bar, there is no such contract and there has been no FmHA approval.

Antonio Metropolitan Transit Authority, 469 U.S. 528, 105 S.Ct. 1005, 88 L.Ed.2d 1016 (1985). Inasmuch as *Garcia* upheld the application of the Fair Labor Standards Act against a city entity as a valid execution of congressional power under the commerce clause, it may or may not be directly controlling in this case. The City of Madison would not prevail even under a broader vision of the Tenth Amendment than the Court propounded in *Garcia*, however, for we perceive no significant limitation on the city's powers by virtue of a statute enacted to protect FmHA's subsidy of rural water authorities. FmHA's characterization of § 1926(b) as resting on Congress's undoubtedly broad powers under the spending clause seems more appropriate to this case than any commerce clause-based argument. Constitution Art. I Section 8, clause 1. See *Helvering v. Davis*, 301 U.S. 619, 645, 57 S.Ct. 904, 910, 81 L.Ed. 1307 (1936) ("When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield.")

The issue is not, as the city would have it, whether under the Tenth Amendment its condemnation power is integral to its sovereignty, but rather whether the provision of water service is essential to its sovereignty. Let us assume that it is. *See Brush v. Commissioner*, 300 U.S. 352, 370-73, 57 S.Ct. 495, 500-02, 81 L.Ed. 691 (1937). Section 1926(b) limits the city's provision of such service not only by condemnation but also by preventing the city from granting a competing franchise, building its own competitive facility or otherwise curtailing the service of the federally funded rural water authority. Section 1926(b) does not, however, permanently curtail the city's authority, because it applies only while the federal debt is outstanding. Additionally, the city may and does regulate growth within that part of Madison served by Bear Creek so as to assure minimum standards of water service such as adequate fire hydrants.

The city can and has in the past collaborated with Bear Creek to collect municipal bills for sewer service. It may also, pursuant to FmHA regulations, agree to purchase facilities from Bear Creek. The limits on the provision of water service are thus restricted in time and in scope so as not to disable the city severely from performing its governmental function. At most, Section 1926(b) ordains a dual water authority function within a municipal area for a period of time.

[7] Equally important, it is likely that FmHA's subsidy to the rural water authority enhanced real estate values and farm prosperity in and around the city and has provided an indirect benefit to the city's overall economic conditions in exchange for the limits on its water service authority. The overall effect of this statute is therefore not so much to infringe the city's sovereign power as to foster a cooperative effort between local and federal authorities. The Tenth Amendment is surely not offended by a limited restriction imposed by the federal government to protect its subsidized loans, particularly when the benefits of those loam accrue to the municipality.

III. CONCLUSION

Because § 1926(b) forbids, as a matter of law, municipal condemnation of an FmHA indebted water association's assets, there was no genuine issue of material fact before the district court. Summary judgment was therefore correctly granted.

AFFIRMED.

Applicability of Prohibition on Curtailment or Limitation of Service

Section 1001(g) of Pub.L. 99-509, as added Pub.L. 100-233, Title VIII, § 803, Jan. 6, 1988, 101 Stat. 1714, provided that: "Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b)) shall be applicable to all notes or other obligations sold or intended to be sold under this section [Pub.L. 99-509, § 1001, amending this section and enacting provisions set out as notes under this section]."

Sale of Rural Development Notes and Other Obligations

Section 1001 of Pub.L. 99-509, as amended Pub.L. 100-233, Title VIII, § 803, Jan. 6, 1988, 101 Stat. 1714, provided that:

"(a) Sales required. — The Secretary of Agriculture, under such terms as the Secretary may prescribe, shall sell notes and other obligations held in the Rural Development Insurance Fund established under section 309A of the Consolidated Farm and Rural Development Act (this section] in such amounts as to realize net proceeds to the Government of not less than —

"(1) $1,000,000,000 from such sales during fiscal year 1987.

"(2) $552,000,000 from such sales during fiscal year 1988, and

"(3) $547,000,000 from such sales during fiscal year 1989.

"(b) [Amended subsec. (e) of this section]

"(c) Contract provisions. — Consistent with section 309A(e) of the Consolidated Farm and Rural Development Act [subsec. (e) of this section], as amended by subsection (b), any sale of notes or other obligations, as

described in subsection (a), shall not alter the terms specified in the note or other obligation, except that, on sale, a note or other obligation shall not be subject to the provisions of section 333(c) of the Consolidated Farm and Rural Development Act [section 1983(c) of this title].

"(d) Eligibility to purchase notes. — Notwithstanding any other provision of law, each institution of the Farm Credit System shall be eligible to purchase notes and other obligations held in the Rural Development Insurance Fund and to service (including the extension of additional credit and all other actions necessary to preserve, conserve, or protect the institution's interest in the purchased notes or other obligations), collect, and dispose of such notes and other obligations, subject only to such terms and conditions as may be agreed to by the Secretary of Agriculture and the purchasing institution and as may be approved by the Farm Credit Administration.

"(e) Loan servicing. — Prior to selling any note or other obligation, as described in subsection (a), the Secretary of Agriculture shall require persons offering to purchase the note or other obligation to demonstrate —

"(1) an ability or resources to provide such servicing, with respect to the loans represented by the note or other obligation, that the Secretary deems necessary to ensure the continued performance on the loan; and

"(2) the ability to generate capital to provide the borrowers of the loans such additional credit as may be necessary in proper servicing of the loans."

"(f)(1) In general. — Before conducting a sale of a portfolio of notes or other obligations under this section [Pub.L. 99-509, § 1001, amending this section and enacting provisions set out as notes under this section], the Secretary of Agriculture shall —

"(A) determine whether the issuer of any unsold note or other obligation desires to purchase the note or other obligation; and

"(B) if so, hold open for 30 days, an offer to sell the note or other obligation to the issuer at a price to be determined under paragraph (2).

"(2) Determination of offering price. —

"(A) Authority. — The Secretary of Agriculture shall determine, in accordance with subparagraph (B), the price at which a note or other obligation shall be offered for sale under this subsection.

"(B) Price. —Such price shall be determined by discounting the payment stream of such note or other obligation at the yield on the then most recent sale of the portfolio, adjusted for changes in market interest rates, servicing and sales expenses, and the maturity and interest rate of such note.

"(3) Prohibitions. —

"(A) Purchase of obligation not tied to purchase of other obligations. — The Secretary of Agriculture shall not require the issuer of any unsold note or other obligation to be offered for sale under this subsection to purchase any other such note or other obligation as a condition of the sale of any such note or other obligation to the issuer.

"(B) Offer to be made without regard to financing. — The Secretary shall offer notes or other obligations for sale to the issuers thereof under this subsection without regard to the manner in which such issuers intend to finance the purchase of such notes or other obligations. However, the price of sale to any issuer using tax exempt financing shall be determined using a yield reflective of the Schedule of Certified Interest Rates as published monthly by the Secretary of the Treasury.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1, AUTHORITY

Plaintiff

vs.

SCIOTO WATER, INC.,

Defendant

and

RICHARD ROMINGER, Acting Secretary, U.S. Department of Agriculture, Rural Economic and Community Development Service (formerly Farmers Home Administration)

Defendant.

CASE NO. C-1-95-204

(Rubin, J.)

FIRST AMENDED COMPLAINT (VERIFIED) FOR TEMPORARY RESTRAINING ORDER; ALTERNATIVELY, PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND MANDAMUS ORDER

NOW COMES SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1 AUTHORITY (hereinafter "Water 1"), Plaintiff, by and through counsel, and files this Complaint for Temporary Restraining Order; Alternatively, Preliminary Injunction, Permanent Injunction, and Mandamus Order, and shows this Honorable Court as follows:

I. PRELIMINARY STATEMENT

1. Water 1, Plaintiff, brings this action complaining of Scioto Water, Inc. ("SWI"). This action is based on violation of 7 U.S.C. § 1926(b), as amended by the Agriculture Credit Act of 1987, P.L. 100-233 § 803(g)[1] which extended the protection of §1926(b) to utilities, such as Water 1, which have obtained the benefits of debt retirement offered pursuant to the Omnibus Budget Reconciliation Act of 1986, P.L. 99-509 § 1001.

2. Supplemental state law claims based on unreasonable groundwater use and violation of UCC Contract provisions are included.

II. JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 based on federal question claims raised under 7 U.S.C. § 1926(b). Jurisdiction is conferred on this Court pursuant to the Intergovernmental Cooperation Act, 31 U.S.C. § 6501, *et seq.* alternatively, the Administrative Procedure Act, 5 U.S.C. § 551.

2. This Court also has jurisdiction pursuant to the Federal Declaratory Judgement Act, 28 U.S.C., § 2201 and § 2202, and the Mandamus and Venue Act, 28 U.S.C. § 1361.

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[1]Section 1001 of the Omnibus Budget Reconciliation Act of 1986 (7 U.S.C. 1929a note) is amended by adding at the end thereof the following new subsections: ... (g) APPLICABILITY OF PROHIBITION ON CURTAILMENT OR LIMITATION OF SERVICE. — Section 306(b) of the Consolidated Farm and Rural Development Act (7 U.S.C. 1926(b)) *shall be applicable to all notes or other obligations sold or intended to be sold under this section.* (emphasis added)

III. VENUE

1. Venue is appropriate in this district pursuant to 28 U.S.C. § 1391 (a).

2. During all relevant times this is the judicial district in which Plaintiff and Defendant, Scioto Water, Inc. (hereinafter "SWI") were located, where the claim arose and where the parties transacted business.

IV. PARTIES

1. Plaintiff Water 1 is a State of Ohio political subdivision, being a regional water district created under the laws of State of Ohio pursuant to Chapter 61, Section 6119 of the Ohio Revised Code. Plaintiff operates under Chapter 61 and is regulated by the Ohio Environmental Protection Agency ("OEPA"). Plaintiff's principal place of business is located at 326 Robert Lucas Road, Lucasville, Scioto County, Ohio 45648.

2. Defendant Scioto Water, Inc. is a private, non-profit water supply corporation on which service of process may be had by serving its President, Donald Spradlin at 1664 State Route 522, Wheelersburg, Scioto County, Ohio, 45694.

3. Defendant Richard Rominger is Acting Secretary of the Department of Agriculture, involved, in this instance, through the Rural Economic and Community Development Service (formerly Farmers Home Administration ("FmHA")), an agency of the U.S. Department of Agriculture. The Department may be served with process by serving its (Acting) Secretary, Richard Rominger, The Administration Building, Room 200A, 14th Street and Independence Avenue, S.W., Washington, D.C. 20250.

V. FACTS

1. Water 1, a Public District, is a wholesale and retail public water purveyor organized pursuant to petition and order of the Court of Common Pleas of Scioto County, Ohio. This Public District was organized at the request of five (5) townships,[2] and became effective upon court order on or about November 28, 1966, pursuant to its Plan of Operation. By resolutions dated September 1, 1967 and January 8, 1968, respectively, Vernon and Bloom Townships became part of the District. Upon information and belief, Porter Township also requested to and became a member of the District although the Township presently cannot locate a copy of its resolution. Further, the defendant FmHA in its financing documents related to the various loans and transactions involving Water 1 acknowledges that these townships are part of the District. Water 1 has continuously provided service or made service available within the eight (8) township area of eastern Scioto County pursuant to the non-impairment provisions of 7 U.S.C. § 1926(b).

2. In 1967, Water 1 issued and sold to the FmHA $2,272,000.00 of water system revenue bonds, dated May 17, 1967, authorized by Ordinance February 16, 1967, as amended March 2, 1967 ("Initial Series"). Subsequent water system revenue bonds for $649,000.00 were issued July 31, 1969 ("Second Series") and purchased. These Second Series Bonds purchased by FmHA were used for the specific purpose of extending Water 1's distribution line to the Vernon, Bloom and Porter townships per their resolution requests. Bonds for $75,000.00 were issued by Water 1 on November 29, 1973 ("Third Series") and purchased by FmHA. These FmHA purchased bonds were secured by all system revenues derived from Water 1's Plan of Operation in the eight townships pursuant to 7 U.S.C. § 1926 which

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[2] Harrison, Madison, Valley, Jefferson, Clay

provided authority to finance, construct, and operate an affordable cost water utility in rural northeast Scioto County, Ohio, as authorized by the 1962 amendments to the Agriculture Act. 7 U.S.C. § 1926(b) protected the area, system, revenues and rate payers (present and future) from any act of impairment.

3. In 1972 SWI sought permission of Water 1 to become Water 1's permittee to extend Water 1's transmission lines to areas in which Water 1 was obligated to provide service or made service available. Permission to create Water 1's new funding guarantee was deemed necessary due to a funding cap imposed by FmHA.[3] SWI's limited purpose is set forth in Exhibit "A." But for the arbitrary funding limitation of the FmHA, SWI would not exist.

4. On May 1, 1975, Water 1 issued water revenue refunding bonds in the amount of $2,473,000.00, having redeemed, by consent of FmHA, the initial and outstanding resource revenue bonds, pursuant to the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921, *et seq.* Said bonds were based on projected revenue resulting from a wholesale water supply contract protected pursuant to 7 U.S.C. § 1926(b).

5. On August 20, 1981, Water 1 and SWI executed an agreement which, inter alia, modified the existing wholesale water purchase agreement to reduce SWI's maximum usage from 17,000,000 gallons per month to 10,000,000 gallons per month. The agreement also provided that Water 1 would permit SWI to purchase bulk water from the City of Portsmouth and that Water 1 would purchase from SWI

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[3]Excerpts from Contract dated August 20, 1981: "SWI has as a part of its system certain water mains which are within the territory of Scioto County Regional Water Authority, . . . *said lines were included by SWI due to the limits of financing prevailing and available by FmHA.* . . . (emphasis added).

certain water lines owned by SWI. The agreement further provided that Water 1 would guarantee the cost of water to SWI for a period of five (5) years and further that Water 1 would serve as an emergency backup source of supply to SWI for water SWI is providing in the Wheelersburg, Ohio area. The defendant, FmHA was fully advised of this agreement. This transaction continued the respective roles of Water 1 and SWI. Water 1 was water producer, wholesale supplier and retailer. SWI was bulk water purchaser and retailer.

6. In 1988, Water 1 enacted a surcharge for water usage by SWI over the contracted maximum of 10,000,000 gallons per month. SWI paid and continues to pay the surcharge for purchases in excess of 10,000,000 gallons per month. This transaction continued the respective roles of Water 1 and SWI. Water 1 was water producer, wholesale supplier and retailer. SWI was bulk water purchaser and retailer.

7. The regular purchases of wholesale water from Water 1 by SWI established a course of dealing between Water 1 and SWI which affected their understanding and interpretation of their contractual relationship, and included terms and conditions outside written agreement(s).

8. Water 1 incurred debt in order to finance expansion of improvements in its wellfield and treatment facility. Water 1 undertook this additional debt in reliance upon the protected revenue stream of the water purchase contract between the parties which was to last for a term of 60 years, based on the correspondence, negotiations, and course of dealing established between the parties over the past 22 years.

9. In 1989, Water 1 took advantage of the FmHA debt buyout program directed by Congress pursuant to the Omnibus Budget Reconciliation Act of 1986, P.L. 99-509 § 1001, authorizing sale by FmHA of its notes and bonds. Alternatively, debtors could refinance their own debt and secure a

"discount" on such debt by refinancing. Congress extended non-impairment protection for such transactions in January 6, 1988 pursuant to the Agricultural Credit Act of 1987.

10. Commencing in 1990 - 1991, SWI sought and subsequently obtained approval of a new FmHA loan and grant, the initial disbursement of which was received by SWI in 1994. It additionally sought Ohio Environmental Protection Agency (hereinafter "OEPA") approval of its plan. SWI proposed development of a new wellfield two miles upstream from Water 1's wellfield and to build supporting surface water treatment plant to provide a water source independent of Water 1.

11. During project development, SWI failed to provide direct notice to its contracting party, Water 1, concerning its plans. SWI projected its wellfield, treatment plant and transmission facilities on inaccurate future customer counts. It included customers of Jackson County Water Company, Inc. ("JCWC") in its effort to falsify the project presentation, even after being apprised by JCWC concerning its customers at a hearing in 1991. FmHA, although apprised of SWI's "over-counting" in 1991, failed to consider the deceit of SWI's counting JCWC customers as future SWI customers. FmHA ignored the falsified data supporting the SWI Application for Federal Assistance until JCWC complained in writing in 1995.

12. SWI's project development, requests for FmHA approval and FmHA's approvals have disregarded Plaintiff Water 1's objections. SWI's project will impair Water 1's system based on: a) loss of bulk water sales; b) loss of underground aquifer water flow with adequate time of travel ("TOT") for purposes of filtration; c) loss of volume of water due to wellfield proximity; d) required redesign and reconstruction of Water 1 water treatment plant; e) loss of retail customers that would have otherwise been served through Water 1, but for the preexisting relationship be-

tween permitter Water 1 and permittee SWI. Each damage above will result in lost revenue to Water 1. Each impairment violates the Act and should be precluded by injunction, damages, or equitable relief pursuant to the Act.

13. On or about March 1, 1995 the SWI project received an inspection by OEPA as a prerequisite to issuance to SWI of an operational permit. Once OEPA issues the permit, SWI will be authorized to operate the treatment plant and wellfields already constructed.

14. SWI's conduct in the 1990 - 1995 period, where it sought to develop its stand-alone system, to the detriment and impairment of Water 1, violated the 20 year long standing relationship whereby SWI was the permittee purchasing water wholesale from Water 1 and transporting and selling same to customers to provide and make service available. SWI's development of wellfield facilities, surface water treatment plant and transmission system to connect into an adjoining county and serve the Village of Oak Hill — and serve retail customers that would have otherwise been served by Water 1 — were acts outside the terms of the permit, agreements, and patterns and practices between the parties and were *ultra vires* and void *ab initio* to the approvals and agreements. The conduct causing impairment was without authority and violated both state and federal law, with active support from the FmHA.

VI. VIOLATION OF 7 U.S.C. § 1926(b)

1. The facts alleged in Section V are included by reference as if fully set forth for all purposes. The conduct of SWI is in violation of 7 U.S.C. § 1926(b). § 1926(b) prohibits curtailment of water service provided or made available. In this case, Plaintiff Water 1 is the protected entity. Curtailment is an " . . . absolute prohibition." *City of Madison, Miss. vs. Bear Creek Water Assn., Inc.*, 816 F.2d 1057, 1059 (5th Cir. 1987). Any acts of SWI to impair

or curtail service provided or made available was *ultra vires* and void *ab initio* under the terms of the parties' agreement as permittor-permittee and violated state and federal law for one or more of the reasons set forth in this Complaint.

2. Congress has extended protection of 7 U.S.C. § 1926(b) to debt made under the 1986 Omnibus Budget Reconciliation Act buy-out program, P.L. 99-509, § 1001, pursuant to the Agricultural Credit Act of 1987, P.L. 100-233 § 803(g). SWI's FmHA funded project will curtail service of Water 1 in its area and impair its ability to repay its indebtedness in violation of 7 U.S.C. § 1926(b) as amended by § 803.

3. FmHA is violating § 1926(b) by providing approvals and financing for the construction of the SWI treatment facilities, thereby impairing Water 1's service and impairing its ability to repay its indebtedness. SWI is violating § 1926(b) by constructing the project to curtail Water 1's service.

4. Water 1 has no adequate remedy at law. Water 1 has exhausted all administrative relief. Should FmHA be allowed to continue funding the project as presently anticipated, Plaintiff Water 1 will suffer irreparable injury. There is an immediate threat of harm because SWI will, having received its operational inspection from OEPA, begin plant operation once the operational permit is issued.

5. Water 1 seeks an Order of this Honorable Court pursuant to the Mandamus and Venue Act and the Federal Injunction Act to require the FmHA to maintain the status quo and cease distribution of any funds obligated to the SWI project, to convey the facilities to Water 1, and to discount the loans made by FmHA to SWI.

6. FmHA has a legal duty not to curtail service by Water 1. Section 1926(b) prohibits such curtailment. Said duty is plainly prescribed. As funding agency charged with

enforcement of the statute that precludes impairment, FmHA is required to obey its own non-impairment Act involved with funding, as well as rules promulgated in aid of the Act and under the Administrative Procedures Act.

7. For the irreparable harm and damage done to Water 1, and for the harm and damage that will continue but for the intervention of this Court, Water 1 has no adequate remedy at law. Such damages are to a large degree incalculable. Water 1 seeks a temporary restraining order to immediately enjoin SWI from receiving (and FmHA from making any further disbursements or approvals) and utilizing any additional funds from FmHA and operation of the facility. Water 1 seeks a preliminary or temporary injunction enjoining SWI from taking any further steps in connection with the funding, approval, permitting, and operation of the project, Phase I, Phase II, Phase III or any additional phases thereto. Water 1 seeks to maintain the status quo of the project until a hearing on preliminary injunction, or a trial on the merits can be had.

8. Water 1 seeks a permanent injunction upon trial of this case, enjoining SWI from receiving any funds from any source to complete the project, pursuing any approvals from the OEPA or ODNR for operation of the Project, actually operating the facilities and from developing or acquiring, directly or indirectly, any other source of water, either independently or from any other water supplier, that would impair Water 1.

9. This injunctive relief will not cause substantial harm to Defendants since the project is not complete and is not currently receiving customer-based revenue. Moreover, the public interest is maintaining affordable water rates and avoidance of default on debt incurred for the benefit of SWI requiring that injunctive relief be granted.

VIII. VIOLATION OF ICA

1. The facts alleged in Sections V through VI are included herein by reference as if fully set forth for all purposes. The failure of SWI to provide notice to, conduct consultation with Water 1 (as well as accurately consult with State and Federal agencies) is in violation of the Intergovernmental Cooperation Act, 31 U.S.C. § 6501, *et seq.* ICA requires notice, an opportunity for hearing and testimony, consultation to avoid duplication or redundant expenditure of federal funds, and a record in support of agency action.

2. Moreover, the Act does not anticipate new federal expenditures will be used to injure and damage a political subdivision through expenditure by a private grantee. As a protected party, Water 1 seeks injunctive relief previously set forth herein to require SWI and FmHA to comply with the statute in connection with pursuit of any funds request. By separate correspondence from James Cogan, RECDS Columbus, Ohio office and James Schwartz, Acting Director of Water and Wastewater, RECDS Washington, D.C. Office, both dated February 28, 1995, the agency admits that Phase III of the SWI project has not been properly reviewed by the state and regional clearinghouse pursuant to Executive Order 12372 and the ICA.[4]

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[4]The Defendant FmHA admits that: We understand that funding has been approved for a treatment plant and a second phase that will provide service to the Village of Oak Hill. The Oak Hill project has not yet been bid, but the funding has been approved. We also understand that original approval by the state clearinghouse covered another phase that will extend service to various places in Scioto and Jackson County. Funds for this project have not been obligated; therefore, we agree that a new clearinghouse review would be needed if Scioto Water Inc. wishes to pursue this phase. (From February 28, 1995 Correspondence, James C. Schwartz, Acting Asst. Administrator, Water and Waste Rural Utilities Service, U.S. Dept. of Agriculture to Mr. Richard W. Beard, President, Scioto County Regional Water District No. 1 Authority.)

VII. DECLARATORY JUDGEMENT ACT

1. Water 1 seeks a determination by this Honorable Court of the rights and liabilities of the parties pursuant to the Federal Declaratory Judgement Act with respect to their relationship as protected parties, contracting entities, permitter-permittee and grantor-grantee.

IX. ATTORNEYS FEES

1. As a result of the conduct of SWI, Water 1 has found it necessary to retain the services of counsel.

2. Upon final trial of this action Water 1 seeks recovery of its attorney fees and costs of court pursuant to the Declaratory Judgement Act, 28 U.S.C. 2412 and Equal Access to Justice Act, 28 U.S.C. 2412.

X. SUPPLEMENTAL JURISDICTION

1. The facts alleged heretofore are included here by reference as if fully set forth here.

2. This Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. The federal and state law claims arise from a common nucleus of operative facts.

XI. OHIO COMMON LAW CLAIM — UNREASONABLE USE OF GROUNDWATER

1. Plaintiff Water 1 incorporates by reference as if fully rewritten herein all of the allegations and averments set forth above.

2. Ohio has adopted a reasonable use doctrine with reference to the use of underground or ground water. *Cline v. American Aggregates Corp.* (1984), 15 Ohio St. 3d 384.

3. Water 1 states that if SWI places its proposed wellfield and facility into operation, its withdrawal of ground water will unreasonably cause harm to the wellfield and ground water treatment facility of Water 1. In addition, especially during time of drought, SWI's proposed well capacity will exceed SWI's reasonable share of the annual supply or total store of ground water.

4. Water 1 requests that the Court enter a preliminary injunction enjoining SWI from operating the plant or, in the alternative, enjoining SWI from withdrawing ground water in such quantities so as to cause interference with Water 1's use of the aquifer. In addition, Water 1 requests monetary damages for harm to the quality and quantity of its water, due to SWI's brine discharge. Water 1 seeks monetary damages in an amount equal to the cost of modifying its ground water treatment facility to treat surface water in compliance with state and federal law (such redesign of the facility necessitated by installation of facilities a mere two (2) river miles upstream).

XII. OHIO LAW — UNIFORM COMMERCIAL CODE

1. Water 1 incorporates by reference all of its allegations and averments set forth above.

2. Water 1 states that the contract between the parties and the course of dealing established between them imposes on both parties an obligation of good faith in the performance and enforcement of the contract and the course of dealing. The obligation of good faith imposed on SWI prohibits it from developing an alternative source of water to replace all or a substantial part of the water SWI purchases from Water 1 pursuant to the contract and course of dealing (Permittor-Permittee).

3. Additionally, the contract of the parties and the course of conduct of the parties over a period of more than 20 years imposes on the partys' requirements of specific performance; by Water 1 to provide adequate service for the demands of SWI and for SWI to purchase the water provided by Water 1 to fulfill SWI's water demand.

4. Water 1 requests that this Court enter preliminary and permanent injunctions against SWI to require it to continue to purchase water from Water 1 in an amount equal to the average monthly purchases pursuant to the contract and course of dealing established within the last twelve (12) months.

PRAYER

WHEREFORE, premises considered, Plaintiff prays this Honorable Court:

1) Grant a temporary restraining order or, alternatively, a preliminary injunction to maintain the status quo by granting interim relief enjoining Defendants from:

   (a) operating the water treatment plant and wellfields which have been, or are currently being constructed;

   (b) disbursing, on the behalf of FmHA, and/or receiving on the part of SWI, any funds from any source to complete the project; whether said funds are "obligated" or not;

   (c) advertising or awarding bids on the project for which FmHA funds or any other funds would be required to fulfill such contracts;

   (d) obtaining any additional approvals, permits or licenses from any source;

(e) completing and/or operating the treatment plant by any other means;

2. Order that the project be placed on hold until such financial analysis of the stability of the system and the viability of the project can be obtained;

3. Upon trial of this case on the merits, determine the rights and liabilities of the parties;

4. Grant, upon trial of the case, a permanent injunction enjoining SWI from receiving any funds from *any* source and order FmHA not to disburse any funds, to complete the project seeking any approvals from the OEPA and ODNR for operation of the Project, and from developing or acquiring, directly or indirectly, any other source of water, either independently or from any other water supplier;

5. Grant an injunction ordering that proper notice and consultation be performed pursuant to ICA, should any project be allowed for new clearinghouse review pursuant to ICA;

6. Declare the acts of SWI to be *ultra vires*;

7. Declare, should the Court declare the acts of SWI *ultra vires*, any and all loan agreements between SWI and FmHA for the aforementioned project as void *ab initio*;

8. Order that the project be placed in the ownership of, or, alternatively, in the receivership of Water 1;

9. Order that FmHA write off as void *ab initio* or, alternatively, discount, its current loan to SWI for the aforementioned project;

10. Award attorneys fees and costs pursuant to 28 U.S.C. 2202 and/or 28 U.S.C. 2412;

11. Award damages as the Court may find Water 1 entitled; and

12. Grant such other and further relief, in law or in equity, as this Honorable Court should find Plaintiff justly entitled.

Respectfully submitted,

John W. Hust /s/ by R.S. Hill
John W. Hust, Esq.
State Bar No. 0027121
TRIAL ATTORNEY FOR PLAINTIFF
SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1
Schroeder, Maundrell, Barbiere & Powers
Governor's Knoll
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Cincinnati, Ohio 45249
(513) 583-4209

Louis T. Rosenberg /s/ by R.S. Hill
Louis T. Rosenberg, Esq.
Texas State Bar No. 17271300
TRIAL ATTORNEY FOR PLAINTIFF
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De Mazieres Building
322 Martinez Street
San Antonio, Texas 78205
(210) 225-5454

AFFIDAVIT
OF
RICHARD BEARD

STATE OF OHIO
COUNTY OF SCIOTO

Comes now Richard Beard, being first duly cautioned and Sworn, states that he is the President of Scioto County Regional Water District No. 1, and that I have read the allegations in the foregoing Verified First Amended Complaint and that said allegations are true to the best of my knowledge, information and belief.

/s/ RICHARD BEARD
RICHARD BEARD

Sworn to before me and subscribed in my presence on this 23rd day of March 1995.

/s/ JANET EVANS
NOTARY

JANET EVANS
Notary Public,
State of Ohio
Commission Expires
Nov. 25, 1996

FINANCIAL ASSISTANCE TO SMALL TOWNS AND RURAL GROUPS

- Water Systems
- Waste Disposal Systems

The Farmers Home Administration makes loans and grants to public bodies and nonprofit organizations primarily serving rural residents to develop domestic water supply systems and waste disposal systems.

Who may receive assistance?

Public or quasi-public bodies and corporations not operated for profit which will serve residents of open country and rural towns and villages up to 5,500 population, which are not part of an urban area, may receive financial and technical assistance in planning, developing and improving and extending water and waste disposal systems when:

1. They are unable to obtain needed funds from other sources at reasonable rates and terms.

2. The proposed improvements will primarily serve farmers, ranchers, farm tenants, farm laborers, and other rural residents.

3. They have legal capacity to borrow and repay the loan, to pledge security for loans, and to operate the facilities or services.

4. They are financially sound and will be effectively organized and managed.

What about grants?

When needed, applicants may obtain grants up to 50 percent of the development cost of a domestic water or waste disposal system.

No financial assistance shall be provided until the Farmers Home Administration determines that the water or

sewer system (a) is designed and constructed so that adequate capacity will be or can be made available to serve the present population of the area plus reasonably foreseeable population growth, (b) is necessary for orderly community development and not inconsistent with planned development under State, county and municipal plans approved as official plans for the area.

How may funds be used?

Loans and grant funds may be used to:

• Install, repair, improve, or expand rural water supply and distribution systems including water supply reservoirs; pipelines; wells; pumping plants and water filtration, chlorination, fluoridation, and iron removal facilities that furnish water for household, livestock, garden irrigation, orchard and crop spraying purposes, fire protection and commercial and industrial use.

• Purchase a water supply or a water right.

• Install, repair, improve, or expand waste collection, treatment, or disposal systems. Facilities to be financed may include such items as sewer lines, treatment plants, settling basins and lagoons.

• Pay engineers, attorneys, construction foremen, and laborers needed in the planning and installation of the facilities.

• Pay other costs related to the improvements, including and acquisition of rights-of-way and easements, relocation of roads and utilities, and construction of service lines.

All designs must be approved by state health departments and all pipeline material must meet recognized standards of quality. Requirements for water treatment and water quality control are maintained at levels acceptable to state and local health departments. Every system financed by FHA must be

designed in compliance with state and local codes, zoning regulations and any existing development plans for the area.

7 USC § 1926

associations, including corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies to provide for the application or establishment of soil conservation practices, shifts in land use, the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities including necessary related equipment, all primarily serving farmers, ranchers, farm tenants, farm laborers, and other rural residents and to furnish financial assistance or other aid in planning projects for such purposes. When any loan made for a purpose specified in this paragraph is sold out of the Agricultural Credit Insurance Fund as an insured loan, the interest or other income thereon paid to an insured holder shall be included in gross income for purposes of chapter 1 of the Internal Revenue Code of 1954 [26 USCS §§ 1 et seq.]. With respect to loans of less than $500,000 made or insured under this paragraph that are evidenced by notes and mortgages, as distinguished from bond issues, borrowers shall not be required to appoint bond counsel to review the legal validity of the loan whenever the Secretary has available legal counsel to perform such review.

(2) The Secretary is authorized to make grants aggregating not to exceed $500,000,000 in any fiscal year to such associations to finance specific projects for works for the development, storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas: Provided, That for fiscal years commencing after September 30, 1981, such grants may not exceed

$154,900,000 in any fiscal year. The amount of any grant made under the authority of this paragraph shall not exceed 75 per centum of the development cost of the project to serve the area which the association determines can be feasibly served by the facility and to adequately serve the reasonably foreseeable growth needs of the area.

(3) No grant shall be made under paragraph (2) of this subsection in connection with any project *unless the Secretary determines that the project (i) will serve a rural area which, if such project is carried out, is not likely to decline in population below that for which the project was designed,* (ii) is designed and constructed so that adequate capacity will or can be made available to serve the present population of the area to the extent feasible and to serve the reasonably foreseeable growth needs of the area, and (iii) is necessary for an orderly community development consistent with a comprehensive community water, waste disposal, or other development plan of the rural area and not inconsistent with any planned development provided in any State, multijurisdictional, county, or municipal plan approved by competent authority for the area in which the rural community is located, and the Secretary shall require the submission of all applications for financial assistance under this section to the multijurisdictional substate areawide general purpose planning and development agency that has been officially designated as a

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SCIOTO COUNTY REGIONAL WATER DISTRICT NO. 1,

Plaintiff

vs.

SCIOTO WATER, INC.,

Defendant

CASE NO. C-1-95-204

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Plaintiff's Complaint for Temporary Restraining Order; Alternatively, Preliminary Injunction and Permanent Injunction has been forwarded by United States Mail on this 24th day of March, 1995 to the following:

Steven L. Mowery, Esq.
8585 Ohio River Road, C.B. 83-05
Wheelersburg, OH 45694

Susanne Cetrulo, Esq.
Ware, Bryson West & Kummer
157 Barwood Drive
Edgewood, KY 41017

JOHN W. HUST /s/ R.S. Hill
John W. Hust

CASE NO. C-1-95-204
(Rubin, J.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SCIOTO COUNTY REGIONAL
WATER DISTRICT NO. 1,
AUTHORITY
Plaintiff

vs.

SCIOTO WATER, INC.,
Defendant

and

RICHARD ROMINGER,
Acting Secretary, U.S. Department of Agriculture,
Rural Economic and Community Development Service
(formerly Farmers Home Administration)
Defendant.

Filed May 17, 1995
??? Murphy, Clerk
Cincinatti, Ohio

MOTION FOR LEAVE TO SUPPLEMENT AMENDED COMPLAINT

COMES NOW, SCIOTO COUNTY WATER DISTRICT NO. 1, AUTHORITY, Plaintiff, by and through Counsel, and files this Motion for Leave to Supplement Amended Complaint and shows the Court as follows:

1. Plaintiff seeks leave of Court to Supplement it's Amended Complaint to add to the jurisdictional statement additional jurisdictional authority for this Court to provide the various forms of equitable and ancillary relief requested,

and to set forth the bases on the jurisdictional authority cited.

2. Section II of the Amended Complaint regarding "Jurisdiction", would be supplemented as follows:

JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 based on federal question claims raised under 7 U.S.C. § 1926(b). Jurisdiction is conferred on this Court pursuant to the Intergovernmental Cooperation Act, 31 U.S.C. § 6501 *et. seq.* and the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, particularly 5 U.S.C. § 701 *et seq.*

2. Moreover, this Court has jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651 *et. seq.* This Court also has jurisdiction pursuant to the Federal Declaratory Judgement Act, 28 U.S.C., § 2201 and § 2202, and the Mandamus and Venue Act, 28 U.S.C. § 1361.

3. Section VII of the Amended Complaint will be supplemented as follows:

VII.A. ADMINISTRATIVE PROCEDURES ACT

1. WATER 1 asserts that Defendant has engaged in conduct contrary to its own rules in funding the SWI project. FmHA rules require that funding of a project occur *after* final approval by state agencies from whom approval must be acquired. Approval of the construction permit was not final for the SWI project when FmHA disbursed funds to begin construction. Moreover, FmHA has not conducted the assessment of SWI's financial condition for SWI to qualify for the loans and grants FmHA has awarded and disbursed, which is required under its regulations.

2. WATER 1 seeks injunction pursuant to the Administrative Procedures Act, 5 U.S.C. § 706, to enjoin FmHA

from taking any further funding or disbursement actions, that the grant and loan awards to SWI be voided, and all liens of the FmHA created under this project be voided.

VII.B. MANDAMUS AND VENUE ACT

1. WATER 1 asserts that FmHA failed in assessing the financial viability of SWI in qualifying for federal loan and grant assistance, and to acknowledge WATER 1's entitlement to § 1926(b) protection, and all of these actions violate the Administrative Procedures Act and the Intergovernmental Cooperation Act, funding a project which violates § 1926(b).

2. WATER 1 seeks a writ of Mandamus pursuant to the Mandamus and Venue Act, to order the Defendant to assess the financial viability and qualification of Defendant, SWI, to acknowledge and consider WATER 1's entitlement to 7 U.S.C. § 1926(b) protection as amended, P.L. 100-233 § 803(g), to cease funding of the SWI project until such assessment has been completed, and to withdraw funding entirely if it is shown that SWI cannot meet its financial and statutory obligations to provide low cost, potable water and repay its loans.

4. The Prayer in the Amended Complaint will be supplemented as follows:

> 8. Order pursuant to the All Writs Act, that the project be placed in the ownership or, in the receivership of WATER 1, alternatively against a trustee and/or create a constructive trust;
>
> 12. Grant any and all relief available pursuant to the All Writs Act;
>
> 13. Order, pursuant to the Administrative Procedures Act, that FmHA be enjoined from any further disbursement or award of funding, by grant or loan, to the SWI project, that FmHA acknowledge 1926(b)

protection of WATER 1 and consider same in assessing SWI project qualification, that grants and loans made by FmHA be voided, and all liens associated with this project be voided, and financial assessment conducted on SWI's financial qualifications for grant and loan funds.

14. Issue a Writ of Mandamus for FmHA to halt funding of the project until the state approval process is final, the financial assessment is completed and considered, and WATER 1 is consulted regarding the effect of the project with acknowledgment of WATER 1's protection under 7 U.S.C. 1926(b), as amended.

15. Grant such other and further relief, in law or in equity, as this Honorable Court should find Plaintiff justly entitled.

5. The supplementing paragraphs are attached hereto as "Exhibit A".

PRAYER

WHEREFORE PREMISES CONSIDERED, Plaintiff prays the Court grant leave to Supplement its Amended Complaint and award such other and further relief, in law or

in equity, to which this Honorable Court should find Plaintiff justly entitled.

Respectfully submitted,

/s/ JOHN W. HURST
John W. Hurst, Esq.
State Bar No. 0027121

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11935 Mason Road, Suite 110
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TRIAL ATTORNEY FOR
PLAINTIFF
SCIOTO COUNTY REGIONAL
WATER DISTRICT NO. 1

/s/ LOUIS T. ROSENBERG
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322 Martinez Street
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(210) 225-5454

TRIAL ATTORNEY FOR
PLAINTIFF
SCIOTO COUNTY REGIONAL
WATER DISTRICT NO. 1

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion for Leave to Supplement Amended Complaint has been served upon the following by Certified Mail, Return Receipt Requested, on this the 16th day of May, 1995.

Steven L. Mowery, Esq.
Mowery, Brown and Blume
Attorneys at Law
8595 Ohio River Road
Wheelersburg, Ohio 45694
Attorney for Scioto Water, Inc.

Susanne Certrulo, Esq.
157 Barnwood Drive
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Attorney for Scioto Water, Inc.

Tim Coombe, U.S. Attorney
U.S. Attorney's Office
Potter Street Building, Room 220
Cincinnati, OH 45202
Attorney for U.S. Dept. of Agriculture

/s/ JOHN W. HUST

CASE NO. C-1-95-204
(Rubin, J.)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

SCIOTO COUNTY REGIONAL
WATER DISTRICT NO. 1,
AUTHORITY

Plaintiff

vs.

SCIOTO WATER, INC.

and

RICHARD ROMINGER,
Acting Secretary, U.S. Department
of Agriculture, Rural Economic
and Community Development Service
(formerly Farmers Home Administration)

Defendant.

**ORDER FOR LEAVE TO
SUPPLEMENT AMENDED COMPLAINT**

On this day came to be considered Plaintiff's Motion to Leave to Supplement Amended Complaint and the Court is of the opinion that said Motion is meritorious and should therefore be GRANTED.

IT IS THEREFORE ORDERED that Leave to Supplement Plaintiff's Amended Complaint is hereby

GRANTED. Said Amended Complaint will be supplemented as per attached "Exhibit A".

AND IT IS SO ORDERED.

SIGNED this day of , 1995.

HONORABLE SANDRA BECKWITH,
UNITED STATES DISTRICT JUDGE

EXHIBIT "A"

SUPPLEMENTS TO AMENDED COMPLAINT

Section II of the Amended Complaint regarding "Jurisdiction," would be supplemented as follows:

JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 based on federal question claims raised under 7 U.S.C. § 1926(b). Jurisdiction is conferred on this Court pursuant to the Intergovernmental Cooperation Act, 31 U.S.C. § 6501 *et seq.* and the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, particularly 5 U.S.C. § 701 *et seq.*

2. Moreover, this Court has jurisdiction pursuant to the All Writs Act, 28 U.S.C. § 1651 *et seq.* This Court also has jurisdiction pursuant to the Federal Declaratory Judgement Act, 28 U.S.C. § 2201 and § 2202, and the Mandamus and Venue Act, 28 U.S.C. § 1361.

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2. WATER 1 seeks injunction pursuant to the Administrative Procedures Act, 5 U.S.C. § 706, to enjoin FmHA from taking any further funding or disbursement actions, that the grant and loan awards to SWI be voided, and all liens of the FmHA created under this project be voided.

VII.B. MANDAMUS AND VENUE ACT

1. WATER 1 asserts that FmHA failed in assessing the financial viability of SWI in qualifying for federal loan and grant assistance, and to acknowledge WATER 1's entitlement to § 1926(b) protection, and all of these actions violate the Administrative Procedures Act and the Intergovernmental Cooperation Act, funding a project which violates § 1926(b).

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>
> 12. Grant any and all relief available pursuant to the All Writs Act;
>
> 13. Order, pursuant to the Administrative Procedures Act, that FmHA be enjoined from any further

disbursement or award of funding, by grant or loan, to the SWI project, that FmHA acknowledge 1926(b) protection of WATER 1 and consider same in assessing SWI project qualification, that grants and loans made by FmHA be voided, and all liens associated with this project be voided, and financial assessment conducted on SWI's financial qualifications for grant and loan funds.

14. Issue a Writ of Mandamus for FmHA to halt funding of the project until the state approval process is final, the financial assessment is completed and considered, and WATER 1 is consulted regarding the effect of the project with acknowledgment of WATER 1's protection under 7 U.S.C. 1926(b), as amended.

15. Grant such other and further relief, in law or equity, as this Honorable Court should find Plaintiff justly entitled.